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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

WOODLANDS TELECOMMUNICATIONS CORPORATION,

Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must a jury decide the effect of the Federal Communications Commission's authority to compel interconnection on Bell's monopoly power?

2. Must a jury decide whether Bell's refusal to interconnect complied with regulatory policy in determining whether Bell violated section 2 of the Sherman Act?

3. Must a jury deduct federal income taxes from lost profits in arriving at a damages verdict in an antitrust case?

PARTIES

Woodlands Telecommunications Corporation, Mid-Texas Communications Systems, Inc., Mitchell Energy & Development Corp., and The Woodlands Development Corporation were appelles below. Southwestern Bell Telephone Company was appellant below.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 615 F.2d 1372. The opinion of the United States District Court for the Southern District of Texas denying motion to dismiss is reported at 447 F. Supp. 1261.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 1, 1980. The petition for rehearing en banc was denied on May 27, 1980. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTES

Section 2 of the Sherman Act, 15 U.S.C. §2, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the Court.

Section 201(a) of the Federal Communcations Act, 47 U.S.C. §201(a), provides:

> It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therfor; and, in acordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical

connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

Section 186 of the Internal Revenue Code provides:

(a) Allowance of deduction. — If a compensatory amount which is included in gross income is received or accrued during the taxable year for a compensable injury, there shall be allowed as a deduction for the taxable year an amount equal to the lesser of —

(1) the amount of such compensatory amount, or

(2) the amount of the unrecovered losses sustained as a result of such compensable injury.

(b) Compensable injury. — For purposes of this section, the term "compensable injury" means —

(1) injuries sustained as a result of an infringement of a patent issued by the United States,

(2) injuries sustained as a result of a breach of contract or a breach of fiduciary duty or relationship, or

(3) injuries sustained in business, or to property, by reason of any conduct forbidden in the antitrust laws for which a civil action may be brought under section 4 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (commonly know as the Clayton Act).

(c) Compensatory amount. — For purposes of this section, the term "compensatory amount" means the amount received or accrued during the taxable year as damages as a result of an award in, or in settlement of, a civil action for recovery for a compensable injury, reduced by any amounts paid or incurred in the taxable year in securing such award or settlement.

(d) Unrecovered losses. —

(1) In general. — For purposes of this section, the amount of any unrecovered loss sustained as a result of any compensable injury is —

(A) the sum of the amount of the net operating losses (as determined under section 172) for taxable year in whole or in part within the injury period, to the extent that such net operating losses are attributable to such compensable injury, reduced by

(B) the sum of —

(i) the amount of the net operating losses described in subparagraph (A) which were allowed for any prior taxable year as a deduction under section 172 as a net operating loss carryback or carryover to such taxable year, and

(ii) the amounts allowed as a deduction under subsection (a) for any prior taxable year for prior recoveries of compensatory amounts for such compensable injury.

(2) Injury period. — For purposes of paragraph (1), the injury period is —

(A) with respect to any infringement of a patent, the period in which such infringement occurred,

(B) with respect to a breach of contract or breach of fiduciary duty or relationship, the period during which amounts would have been received or accrued but for the breach of contract or breach of fiduciary duty or relationship, and

(C) with respect to injuries sustained by reason of any conduct forbidden in the antitrust laws, the period in which such injuries were sustained.

(3) Net operating losses attributable to compensable injuries. — For purposes of paragraph (1) —

(A) a net operating loss for any taxable year shall be treated as attributable to a compensable injury to the extent of the compensable injury sustained during such taxable year, and

(B) if only a portion of a net operating loss for any taxable year is attributable to a compensable injury, such portion shall (in applying section 172 for purposes of this section) be considered to be a separate net operating loss for such year to be applied after the other portion of such net operating loss.

(e) Effect on net operating loss carryovers. — If for the taxable year in which a compensatory amount is received or acrued any portion of a net operating loss carryover to such year is attributable to the compensable injury for which such amount is received or accrued, such portion of such net operating loss carryover shall be reduced by an amount equal to —

(1) the deduction allowed under subsection (a) with respect to such compensatory amount, reduced by

(2) any portion of the unrecovered losses sustained as a result of the compensable injury with respect to which the period for carryover under section 172 has expired.

STATEMENT OF THE CASE

At the conclusion of a six-weeks trial, a jury found that Southwestern Bell Telephone Company ("Bell") willfully used its monopoly power to exclude Woodlands Telecommunications Corporation ("WTC") from the telephone business at The Woodlands, Texas, and that WTC had suffered damages of $18,369,827. (R. 648). Pursuant to its jurisdiction under section 4 of the Clayton Act, 15 U.S.C.

§ 15, the trial court trebled damaged to $55,109,481 and entered judgment for WTC. (R. 695).

The Woodlands is a new town being developed on approximately 20,000 acres of previously uninhabited timberland near Houston, Texas (Tr. 1122), pursuant to the Urban Growth and New Community Development Act of 1970, 42 U.S.C. § 4501 *et. seq.* When completed, The Woodlands will have a population of 150,000 with extensive commercial, industrial, educational, and recreational facilities. Since there was no existing telephone service to this previously uninhabited area, the developer was required by the Department of Housing and Urban Development ("HUD") to arrange for telephone service to be provided. (PX 227). No state agency assigned service areas in Texas at this time so any telephone company was free to offer service. A number of companies, including Bell, made competitive proposals to the developer. (PX 63). The proposal of Mid-Texas Communications Systems, Inc. ("Mid-Texas") to form WTC to provide innovative services utilizing the latest technological advances proved to be the most attractive. A joint venture agreement was signed on August 30, 1972, between Mid-Texas and Mitchell Energy & Development Corp. (PX 83), and WTC was organized and began preparations to serve. (Tr. 1499-1507).

A new company unaffiliated with the Bell System must gain access to the interstate telephone network through interconnection with the nearest Bell System company. Keeping with its policy that "[e]ach system which is purchased and installed by one of our competitors means lost revenue to [our] company" (PX 59), and because it would set an example that it expected to be repeated in other new towns throughout the state of Texas (PX 93), Bell refused to interconnect with WTC. WTC filed a complaint requesting the Federal Communications Commission

("FCC") to compel the interconnection (PX 123) and tried other means to provide interim service until the FCC could act on the complaint. (Tr. 1532-78). Bell employed various tactics to prevent timely FCC action and thwarted each of the means WTC tried to provide interim service.

Finally, Bell resorted to economic coercion of Mid-Texas to force it to cause the FCC complaint to be withdrawn. Bell unilaterally changed the basis upon which it divided long-distance revenues with Mid-Texas in other areas of the state where Mid-Texas operated telephone companies and applied the change retroactively so as to backbill Mid-Texas for $160,000. (Tr. 1530-59). A Bell vice-president pressured the man who was president of both Mid-Texas and WTC to withdraw the FCC complaint, telling him that "The Woodlands case was a dangerous precedent-setting matter" (Tr. 1018); "Southwestern Bell would use all legal means to oppose such a dangerous precedent-setting filing" (Tr. 1018); even if he got an order compelling Bell to interconnect, he would still have problems getting Houston metro and intrastate connections (Tr. 1021-22); and that "it was going to be a long, hard battle." (Tr. 1022). Faced with this pressure and Bell's barricade of access to the interstate telephone network, WTC was forced to withdraw its FCC complaint so that Bell would provide service when The Woodlands was opened for public occupancy. (Tr. 1851).

REASONS FOR GRANTING THE WRIT

A writ should be granted in this case because: (1) it presents three important questions of antitrust law which should be settled by this Court; and (2) the Fifth Circuit has decided these questions in a way in conflict with applicable decisions of this Court and other circuits. Those questions involve the standards to be applied and the role

of the jury in determining the existence of monopoly power, the misuse of monopoly power, and the effect of federal income taxes on antitrust damages. A large number of cases involving the same issues are pending in the lower courts. In its Motion to Expedite Oral Argument in the Fifth Circuit, Bell advised the court that there are more than forty antitrust cases pending against Bell System companies and that "[t]he prompt resolution of the issues involved in this appeal could be invaluable, both to the parties and to the courts, in all of the antitrust cases pending against the Bell System, and possibly in a number of other such cases pending against regulated common carriers and public utilities."[1] The impractical and conflicting nature of the Fifth Circuit's decisions on these important questions makes it all the more imperative that this Court grant certiorari in this case. Experience has shown that trials of these cases impose heavy strains on the

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[1] Several courts have rejected the Bell System companies' attempts to dismiss plaintiffs' claims prior to trial on the basis of regulatory immunity; therefore, the same questions presented here must be faced in the trial of those cases. *See United States* v. *AT&T*, 427 F. Supp. 57 (D.D.C. 1976), *cert. denied*, 429 U.S. 1071 (1977), *cert. denied*, No. 77-1009 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 966 (1977), *on reconsideration*, 461 F. Supp. 1314 (D.D.C. 1978); *MCI Communications Corp.* v. *AT&T*, 462 F. Supp. 1072 (N.D. Ill. 1978); *Litton Systems, Inc.* v. *AT&T*, 1980-1 Trade Cas. ¶ 63,246 (S.D.N.Y. 1980); *Southern Pacific Communications Co.* v. *AT&T*, No. 78-0545 (D.D.C. July 2, 1979); *Sound, Inc.* v. *AT&T*, 1979-2 Trade Cas. ¶ 62,974 (S.D. Iowa 1979); *Fox & Jacobs, Inc.* v. *AT&T*, No. S-77-77-CA (E.D. Tex. 1979); *Northeastern Telephone Co.* v. *AT&T*, 1979-1 Trade Cas. ¶ 62,548 (D. Conn. 1978); *Interconnect Planning Corp.* v. *AT&T*, 1979-1 Trade Cas. ¶ 62,655 (S.D.N.Y. 1978); *Jarvis, Inc.* v. *AT&T*, 1978-2 Trade Cas. ¶ 62,197 (D.D.C. 1978); *Chastain* v. *AT&T*, 401 F. Supp. 151 (D.D.C. 1975); *Macom Products Corp.* v. *AT&T*, 359 F. Supp. 973 (C.D. Calif. 1973); *Essential Communications Systems, Inc.* v. *AT&T*, 610 F.2d 1114 (3rd Cir. 1979).

time and resources of the courts, juries, and parties.[2] An authoritative resolution of these questions would reduce substantially the possibility of trial error and the risk of re-trials in all these cases, thereby providing a significant public benefit. This case is ideal for the resolution of these questions because it involves only discrete questions of the proper standards to be applied, questions that may be decided by this Court without any necessity of becoming enmeshed in a detailed consideration of the evidence. Consequently, answers to these questions here would provide guidelines applicable in all the other pending cases. Furthermore, the answer to the question regarding the effect of income taxes on damages will be applicable to all private antitrust suits.

I. THE IMPORTANCE OF THE MONOPOLY POWER QUESTION

The first question — Must a jury decide the effect of the FCC's authority to compel interconnection on Bell's monopoly power? — is important because it presents a fundamental question of the effect of regulatory authority on the existence of monopoly power and the role to be assigned to juries, if any, in resolving that question. The same fundamental question will be present in every section 2 case involving a regulated industry when an agency has

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[2] The trial of this case lasted six weeks and required five years to prepare. The recently completed trial of *MCI Communications Corp.* v. *AT&T*, 462 F. Supp. 1072 (N.D. Ill. 1978), covered a period of three and one-half months. Other recent trials of monopolization cases similarly have required protracted trials: *ILC Peripherals Leasing Corp.* v. *IBM Corp.*, 458 F. Supp. 423 (N.D. Calif. 1978) (six months); *SCM Corp.* v. *Xerox Corp.*, 463 F. Supp. 983 (D. Conn. 1978) (fourteen months); *United States* v. *IBM*, No. 69-200 (S.D.N.Y. 1969) (continuing into its seventh year); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263 (2nd Cir. 1979), *cert. denied*, 100 S. Ct. 1061 (1980) (seven months).

authority to compel action by a recalcitrant monopolist. Since the Fifth Circuit's decision of that question confuses the nature of the pertinent inquiry and imposes an undue burden on the jury to decide a question it should not be asked to decide, review of the Fifth Circuit's decision is particularly justified.

One of the goals of the Federal Communications Act of 1934 was to make available a nation-wide communication service. 47 U.S.C. § 151. To achieve that goal, Congress allowed telephone companies to work out agreements for interconnection of their lines without regulatory licensing or supervision. When one company refused to interconnect voluntarily, however, Congress, in section 201(a) of the Act, 47 U.S.C. § 201(a), empowered the FCC to compel interconnection in the public interest. Bell argued that the mere existence of section 201(a) immunized it from application of the antitrust laws or, alternatively, prevented it from possessing monopoly power as a matter of law. The trial court rejected Bell's legal arguments, App. at A-37, and concluded that since Bell did not otherwise dispute that it controlled access to the facilities WTC needed to enter business, there was no issue of fact on the existence of monopoly power. Consequently, he instructed the jury that "Southwestern Bell has 'monopoly power' in the relevant market in this case in that Southwestern Bell controlled the essential facilities of long-distance lines and NNX codes to which competitors must have access to do business." (R. 624).

The Fifth Circuit agreed that Bell was not immune from the antitrust laws but held that the jury, not the trial court, should decide the question of the effect of section 201(a) on the monopoly power issue: "Whether Bell possessed sufficient power to exclude competition in light of section 201(a) is a question for the jury's consideration." App. at

A-26. The effect of the Fifth Circuit's decision will be to lend perverse justification to the criticism of juries' ability to decide antitrust cases[3] and is contrary to the current efforts to simplify and shorten jury trials of antitrust cases.[4] The difficulty the jury will experience in dealing with this question on remand and the similar questions to be faced by juries in the other pending cases stems not from any inherent shortcomings on their part, but rather from the fact that they are being forced to decide an abstract legal question instead of resolving a factual dispute.[5]

Stated simply, it makes no sense to ask a jury what the legal effect is of section 201(a) on Bell's power to control access to the interstate telephone network. That is a ques-

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[3] *See* Lynch, *The Case for Striking Jury Demands in Complex Antitrust Litigation,* 1 REV. OF LITIGATION 3 (1980); Harris & Liberman, *Can the Jury Survive the Complex Antitrust Case?* 24 N.Y.L. SCH. L. REV. 611 (1979); Comment, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment,* 10 CONN. L. REV. 775 (1978); Note, *The Right to a Jury Trial in Complex Civil Litigation,* 92 HARV. L. REV. 898 (1979).

[4] REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES (1979); *Complex Litigation Materials: Proposed Procedural Revisions to Expedite the Resolution of Complex Antitrust Cases,* 48 ANTITRUST L. J. 663 (1980).

[5] It has been aptly noted that:

> All this [criticism] may say less about the jury system than about the laws juries are being asked to consider. If antitrust and securities cases are so difficult to comprehend it may be a sign that in those areas the law itself needs to be reconsidered. Might it also mean that juries are being forced to render legal judgments on the basis of legal theories that are losing touch with reality?

Shaffer, *Those Complex Antitrust Cases,* Wall St. J., Aug. 29, 1978, at 16, col. 4.

tion of law which should be decided by the court.[6] The same point was made in another monopolization case involving a regulated industry when the defendant complained of the trial court's refusal to instruct the jury to consider the effect of a regulatory statute:

> Greyhound complains of the district court's 'failure to instruct on section 5(11).' It is not clear precisely what Greyhound has in mind. The extent to which Greyhound's conduct was exempt from the antitrust laws by the Interstate Commerce Act was a legal question, not an issue of fact for the jury.

Mt. Hood Stages, Inc. v. *Greyhound Corp.*, 555 F.2d 687, 695 (9th Cir. 1977), *rev'd on another ground*, 437 U.S. 322 (1978).

Moreover, the Fifth Circuit's holding, that the existence of a remedial, regulatory statute may have the effect of preventing one from possessing monopoly power, conflicts with this Court's decision in an almost identical case, *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973). Otter Tail generated and transmitted electric power to a number of towns. When four of those towns decided to replace Otter Tail with independently-owned systems, they had to obtain wholesale power from Otter Tail or purchase it elsewhere and have Otter Tail "wheel" the power over its transmission network. Otter Tail refused to do either. Two towns filed complaints with the Federal Power Commission ("FPC") to compel interconnection under a statute, 16 U.S.C. §824a(b), which is nearly identical to section 201(a). One town was successful in obtaining such an order; an-

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[6] Professors Areeda and Turner have criticized the practice of some trial courts of leaving ultimate legal questions to be decided by juries. "[T]here is no excuse for leaving the jury to flounder on matters where it is ignorant or, at best, ill-informed." 3 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 315c at 54 (1978).

other town withdrew its complaint because it could not stand the delay and financial burden imposed; and two other towns were able to obtain power elsewhere. In affirming that Otter Tail's refusal to deal violated section 2 of the Sherman Act, this Court held: "The fact that three municipalities which Otter Tail opposed finally got their municipal systems does not excuse Otter Tail's conduct. That fact does not condone the antitrust tactics which Otter Tail sought to impose." 410 U.S. at 380-81. Since the fact that the FPC actually used its statutory authority to compel interconnection did not prevent Otter Tail from being held to possess monopoly power, the mere existence of substantially the same authority unexercised by the FCC certainly cannot prevent Bell from being held to possess monopoly power.[7]

II. THE IMPORTANCE OF AND CONFLICTING DECISIONS ON THE MONOPOLIZATION QUESTION

The second question — Must a jury decide whether Bell's refusal to interconnect complied with regulatory policy in determining whether Bell violated section 2 of the Sherman Act? — is important because it raises significant questions

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[7] Likewise, the authority of the Interstate Commerce Commission to order through-routing did not alter the unlawful nature of the refusals to deal in *United States* v. *Terminal Railroad Ass'n*, 224 U.S. 383 (1912), or in *United States* v. *Pacific & A.R.&N. Co.*, 228 U.S. 87 (1913). Similarly, the fact that other news agencies were available did not deter this Court from holding the Associated Press' refusal to deal unlawful in *Associated Press* v. *United States*, 326 U.S. 1 (1945). Other circuits also are in agreement on this point: "defendants may not be heard to say that they have not established a monopoly merely because they do not interfere with an outside warehouse if it can shift for itself"; *American Fed. of Tobacco Growers* v. *Neal*, 183 F.2d 869, 872 (1950); "The short answer to this [defendants' contention that they lacked monopoly power because other sites were available] is that a monopolized resource seldom lacks substitutes; alternatives will not excuse monopolization"; *Gamco, Inc.* v. *Providence Fruit & Produce Bldg.*, 194 F.2d 484, 487 (1952).

of the proper standard to be applied in assessing misuse of monopoly power and the proper context in which regulatory policy should be considered in antitrust cases. The Fifth Circuit's decision applies a standard in conflict with the standard applied by this Court and misplaces a duty on the jury to consider regulatory policy in determining whether a refusal to deal violates antitrust law.

The trial court followed the opinions of this Court in instructing the jury on the standards it was to apply in determining whether Bell misused its monoply power. He instructed the jury that the pertinent inquiry was whether Bell willfully maintained its monopoly power (R. 624), as stated by this Court in *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). In deciding that question, he instructed the jury that the use of monopoly power to foreclose competition or to gain a competitive advantage, or to destroy a competitor, is unlawful (R. 625), in accordance with *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 377 (1973), and *United States* v. *Griffith,* 334 U.S. 100, 107 (1948).

Although it discussed anticompetitive purpose or intent, the Fifth Circuit applied a different standard: "section 2 prohibits only those refusals to deal which under the particular circumstances of a case are unreasonably anticompetitive," App. at A-30, and held that the jury must resolve "the reasonableness of Bell's actions" under instructions from the trial judge "as to the relevant regulatory framework." App. at A-33.

A. THE MISUSE STANDARD

The Fifth Circuit thus abandoned the anticompetitive purpose or intent standard applied by this Court and adopted the "unreasonableness" standard advocated by the Sixth Circuit in *Byars* v. *Bluff City News Co.*, 609 F.2d 843,

853 (6th Cir. 1979). The Sixth Circuit in *Byars* expressed its dissatisfaction with this Court's standard and declared that "what should matter is not the monopolist's state of mind, but the overall impact of the monopolist's practices." 609 F.2d at 860. It decided, therefore, to apply a standard similar to the Rule of Reason applied in Sherman Act section 1 cases requiring determination "whether the monopolist's conduct is unreasonably anti-competitive and thus unlawful." *Id.*

This standard is not only in square conflict with the standard applied in *Otter Tail*[8] and this Court's other section 2 decisions[9] but also rejects the emphasis this Court has given to the overall importance of anticompetitive purpose. As recently as *McLain* v. *Real Estate Board of New Orleans, Inc.*, 100 S.Ct. 502, 509 (1980), this Court emphasized that "in a civil action under the Sherman Act, liability may be established by proof of *either* an unlawful purpose or an anticompetitive effect." [Court's emphasis.]

This conflict on so fundamental a point should not go unresolved. It will cause confusion in the lower courts and the application of different standards among the circuits;[10]

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[8] The Fifth Circuit said that *Otter Tail* did not determine this issue because, "*Otter Tail* did not present a case like the present one where the utility is arguing that its actions were justified by articulable public interest factors." App. at A-30 n.14. This attempted distinction is erroneous. The majority opinion reveals that Otter Tail did make such an argument: Otter Tail "assert[ed] that compulsory interconnection or wheeling will erode its integrated system and threaten its capacity to serve adequately the public." 410 U.S. 381. Justice Stewart's dissent deals with the argument in greater detail. 410 U.S. 389.

[9] *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966); *United States* v. *Griffith*, 334 U.S. 100 (1948); *Associated Press* v. *United States*, 326 U.S. 1 (1945); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927).

[10] The Ninth Circuit also employed an "unreasonableness" standard in *California Computer Products, Inc.* v. *IBM Corp.*, 1971-1 Trade Cas. ¶ 62,713 (9th Cir. 1979). Other circuits have applied this

moreover, it disregard the reasons and necessity for policing the conduct of monopolists more closely under section 2 than the conduct of non-monopolists under section 1.[11]

B. CONSIDERATION OF REGULATORY POLICY

The Fifth Circuit's rejection of the established standard became all the more significant when it decided that the "unreasonableness" standard it had created required the jury to apply the public interest test of section 201(a) in determining whether Bell's actions were unreasonable. App. at A-30. That decision conflicts with applicable principles adopted by this Court on two related points: first, it misplaces consideration of regulatory policy by making it the standard for determining monopolization rather than limiting consideration to whether it conflicts with antitrust policy under the implied immunity doctrine; and, second, even if a Rule of Reason standard were applicable, it assesses reasonableness from the regulatory perspective rather than the antitrust perspective.

Court's anticompetitive purpose or intent standard. *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263 (2nd Cir. 1979), *cert. denied*, 100 S. Ct. 1061 (1980); *Smithkline Corp.* v. *Eli Lilly & Co.*, 575 F.2d 1056 (3rd Cir. 1978); *cert. denied*, 439 U.S. 838 (1978); *Sargent-Welch Scientific Co.* v. *Ventron Corp.*, 567 F.2d 701 (7th Cir. 1977), *cert. denied*, 439 U.S. 822 (1978); *Telex Corp.* v. *IBM Corp.*, 510 F.2d 894 (10th Cir. 1975), *cert. dismissed*, 423 U.S. 802 (1975); *Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978). Prior to its decision in this case, the Fifth Circuit also had applied the anticompetitve purpose or intent standard. *See Woods Exploration & Producing Co.* v. *Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

[11] "There are kinds of acts which would be lawful in the absence of monopoly but, because of their tendency to foreclose competitors from access to markets or customers or some other inherently anticompetitive tendency, are unlawful under § 2 if done by a monopolist." *Sargent-Welch Scientific Co.* v. *Ventron Corp.*, 567 F.2d 701, 711 (7th Cir. 1977), *cert. denied*, 439 U.S. 822 (1978).

1. The Appropriate Context for Consideration of Regulation

On the first point, the purpose of the implied immunity doctrine is to determine which standard — regulatory or antitrust — Congress intended to apply to particular conduct.[12] It must be one or the other for plainly Congress did not intend that juries be required to make regulatory judgments in the context of deciding violations of the antitrust laws. Yet that is precisely what the Fifth Circuit's decision requires. In a prime example of circular reasoning, the Fifth Circuit holds that the antitrust laws are applicable to Bell's conduct but that the lawfulness of that conduct under the antitrust laws is to be judged under the regulatory standard.

The justification given for such curious reasoning is "public policy":

> This holding is based on the structure and effect of section 201(a) under which the FCC, upon appropriate demand, is empowered to determine whether a particular interconnection is in the public interest. The FCC's inquiry is controlled by its consideration of the public interest as informed by the general concerns of the Communications Act and prior adjudicatory decisions under section 201(a). As previously noted, it is possible that in certain situations, interconnection will not be in the public interest. . . . In those instances, public policy will be vindicated only if interconnection is denied. Prevention can occur only if the private utility denies interconnection in the first instance. Where the private concern properly denies an interconnection, it would be contrary to public policy to permit antitrust liability against it.

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[12] *See Gordon* v. *New York Stock Exchange*, 422 U.S. 659, 691 (1975); *United States* v. *National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 720 (1975); Note, *Antitrust and Regulated Industries: A Critique and Proposal for Reform of the Implied Immunity Doctrine*, 57 TEXAS L. REV. 751, 760-61 (1979).

App. at A-31. Consideration of public policy "based on the structure and effect of section 201(a)" is an appropriate inquiry, but solely in the context of determining whether Congress intended antitrust immunity for refusals to interconnect. It is that very structure and effect that compelled the conclusion that Congress did not intend to create such an exemption because it left the decision whether to interconnect, in the first instance, to the business judgment of the parties. If Congress had considered that prevention of undesirable interconnections was a paramount public interest, it would have made section 201(a) a licensing statute and prohibited all interconnections unless and until the FCC found them to be in the public interest. Having chosen instead to leave the matter to the business judgment of the parties, the logical corollary is that Congress also intended that if that business judgment was based on anticompetitive purpose or intent, its exercise should be penalized under the antitrust laws as well as being subject to compulsory order of the FCC.

Most importantly, the rationale for the Fifth Circuit's holding, that "it would be contrary to public policy to permit antitrust liability against [Bell if the interconnection would not have been in the public interest]," is contrary to this Court's holding in *United States* v. *Radio Corp. of America,* 358 U.S. 334 (1959), that antitrust liability may be imposed even when the FCC has approved expressly defendant's action as being in the public interest. *Accord California* v. *Federal Power Commission,* 369 U.S. 482, 489 (1962) ("approval of the transaction by the Commission would be no bar to the antitrust suit"); *see Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 373 (1973).

Moreover, this supposed accommodation to public policy by incorporating the regulatory standard into the antitrust standard is unworkable. Neither trial judges nor juries are

equipped to assess the regulatory factors relevant to deciding whether the proposed interconnection would have been in the public interest.[13]

2. Application of the Rule of Reason

On the second point, the Fifth Circuit's holding that the reasonableness of Bell's refusal to interconnect must be judged under the public interest standard of section 201(a) conflicts with the principles regarding proper application of the Rule of Reason set out in *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978). This Court carefully explained the limited context within which the Rule of Reason is applied: "Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions." 435 U.S. at 688. In a passage that is particularly applicable to the case at hand, this Court said:

> The early cases also foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition. . . . That

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[13] In his analysis of the standards applied in monopolization cases, Professor Sullivan observes that "the judicial system, particularly the jury system, which can handle issues of conduct and even motive with some degree of comfort, is ill-equipped to deal skillfully with structural analysis." L. SULLIVAN, ANTITRUST LAW § 25 at 81 (1977). Further he says:

> If there is one task that judges and juries informed through the adversary system, may really be good at, it is identifying the pernicious in human affairs. To contend that the conventional formulation, which looks, in a sense, for evil, ought to be amended to one which looks solely to an effect validated by economic studies is to assume too much about the precision of applied economics and to assume too little about the value of more humanistic modes of inquiry.

Id. § 43 at 110.

> kind of argument is properly addressed to Congress and may justify an exemption from the statute for specific industries, but it is not permitted by the Rule of Reason.

435 U.S. at 689-90. The Court concluded its explication of the Rule by stating:

> [T]he purpose of the analysis is to form a judgment about the competitive significance of the restraint; *it is not to decide whether a policy favoring competition is in the public interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.* [Emphasis added.].

435 U.S. at 692. Thus, the Fifth Circuit has held that the Rule of Reason must be applied in a manner and for a purpose directly contrary to what this Court has held is its true role and purpose.

The Ninth Circuit has made the point in a case involving the telephone industry. In *ITT Corp.* v. *GTE Corp.*, 518 F.2d 913 (9th Cir. 1975), the court explained that:

> If an activity is nonexempt, the antitrust laws apply with undiminished force, whether or not the activity is regulated. *Put another way, if a claim of exemption is rejected in an antitrust suit, the only pertinent frame of reference is the antitrust law.* The 'advantages' flowing from the challenged activity and purportedly fostered by the regulatory scheme become as irrelevant as they would be in the absence of any regulation whatsoever. [Emphasis added.]

518 F.2d at 935. The Fifth Circuit misunderstood the Ninth Circuit's further observation that regulation is not irrelevant from a *factual perspective.* The Ninth Circuit said that although regulation is to be assessed as another fact of market life, "[i]n the absence of an exemption claim, the

fact of regulation is significant, but not because it embodies a doctrinal scheme different from the antitrust law; the sole legal perspective is that afforded by the antitrust law." *Id.*

The Ninth Circuit illustrated what it meant by saying: "This was the approach taken in *United States* v. *Marine Bancorporation,* 418 U.S. 602 (1974)." 518 F.2d 936 n.85. The government there brought an action under section 7 of the Clayton Act challenging a proposed merger between two commercial banks. The government relied on the theory of potential competition, arguing that the merger would eliminate the possibility that the acquiring bank would enter the market *de novo.* State law prohibited the kind of branching that would have been necessary for the acquiring bank to enter the market *de novo.* The regulatory framework discussed there had nothing to do with the legal standard by which defendants' conduct was to be judged under the Clayton Act. That standard, the potential competition doctrine, was purely the creature of antitrust law. Defendants would have violated the Clayton Act under that doctrine if their merger would have reduced the possibility of increased competition in the market. State regulatory law was relevant only on the facts to which the doctrine was to be applied; that is, it was relevant, as a factual matter, to the possibilities that the acquiring bank could have entered the market *de novo.* It was not an alternative, potentially incompatible, test for judging the legality of the merger, nor were the state regulations on branching in any way introduced into the legal test for determining the legality of a merger under the potential competition doctrine. The regulations were relevant only on the facts. It was in this sense, and in this sense only, that the Court stated: "We further hold . . . that the application of the [potential competition] doctrine to commercial banking must take into account the unique federal and state regula-

tory restraints on entry into that line of commerce. Failure to do so would produce misconceptions that go to the heart of the doctrine itself." *Id.* at 627. The Fifth Circuit's quotation of this language, App. at A-33, is thus inapposite and it offers no support to the Fifth Circuit's decision here.

The conflict is clear: under the principles applied by this Court and the Ninth Circuit, once it is determined that Bell's actions are nonexempt, the lawfulness of Bell's action must be judged solely from the perspective of the antitrust laws; but the Fifth Circuit says that even though Bell's actions are nonexempt, their lawfulness is to be judged from the perspective of the regulatory standard. The need for uniformity and efficient utilization of judicial resources requires that this conflict be resolved so that the more than forty lower courts faced with this dilemma in the other cases pending against Bell System companies will know which standard is to be applied.

III. THE CONFLICT ON THE TAX QUESTION

The Fifth Circuit held that damages in an antitrust suit must be reduced by federal income taxes. App. at A-36. This holding is an unwarranted departure from this Court's precedent in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corporation,* 392 U.S. 481 (1968). In *Hanover Shoe,* this Court addressed the issue of whether actual damages should be reduced by federal income taxes in an antitrust case. The Court acknowledged that an antitrust plaintiff is damaged only to the extent of after-tax profits, but pointed out that both actual and treble antitrust damages are taxed at the time of recovery under the rule of *Commissioner of Internal Revenue* v. *Glenshaw Glass Co.,* 348 U.S. 426 (1955). The Court held, therefore, that reduction of antitrust damages by federal income taxes is improper because it constitutes double taxation. The decision of the Fifth

Circuit is in direct conflict with that holding. Bell did not make this argument either in the trial court or on appeal and the Fifth Circuit's *sua sponte* holding fails to consider *Hanover Shoe* or the pertinent provision of the Internal Revenue Code ("IRC"); indeed, the only authority mentioned is this Court's recent decision in *Norfolk & Western Railway Co.* v. *Liepelt,* 100 S.Ct. 755 (1980). Consideration of these authorities will reveal that there is no basis for the Fifth Circuit's failure to follow *Hanover Shoe.*

A. EFFECT OF IRC § 186

In 1969, Congress enacted section 186 of the Internal Revenue Code, a very complex provision allowing a narrow and limited income tax deduction for cetain amounts recovered in connection with an antitrust injury. Although a cursory reading of section 186 might suggest that it affects the rationale supporting *Hanover Shoe,* a critical analysis of section 186 in light of its legislative history and the principles underlying income taxation reveals that section 186 has no impact whatsoever on the holding in *Hanover Shoe* or its underlying rationale.

An antitrust plaintiff still must include the entire amount of antitrust damages in gross income. Section 186 allows a deduction with respect to that amount only to the extent of the lesser of (1) the compensatory amount,[14] i.e., the amount of actual damages (excluding punitive damages)[15] reduced by costs of recovery (e.g., attorneys' fees, court costs)[16] or (2) the amount of net operating losses[17] sustained in prior taxable years, but only to the extent that losses attributable

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[14] IRC § 186(a)(1).

[15] Treas. Reg. § 1.186-1(c)(1).

[16] IRC § 186(c); Treas. Reg. § 1.186-1(c)(4).

[17] A net operating loss is an excess of allowable deductions over gross income. IRC § 172(c).

to the antitrust injury were sustained in those same years and only to the extent that those net operating losses were not previously deducted under IRC § 172.[18]

A close analysis of section 186 reveals that it allows a deduction with respect to antitrust damages only to the extent that the antitrust plaintiff was denied the tax benefit of income tax deductions customarily allowed in computing taxable income. Thus, the purpose and effect of section 186 is not to exempt any portion of antitrust damages from taxation, but rather to insure that the amount actually taxed upon recovery represents only taxable income[19] and does not include any amounts that would have been allowed as deductions but for the antitrust injury. This reading of section 186 is in accord with its legislative history.[20] At least one commentator has reached a contrary conclusion. *See* Comment, *The Role of Income Taxes in Determining Antitrust Treble Damages Awards,* 56 TEXAS L. REV. 293 (1978). That conclusion, however, is based on an entirely erroneous reading of section 186,[21] thus demonstrating the complexity of the section and its susceptibility to misinterpretation.

Since the entire amount of an antitrust recovery is still subject to taxation at the time of recovery to the extent

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[18] IRC § 186(a)(2); IRC § 186(d)(1), (3); Treas. Reg. § 1.186-1(d)(1), (3).

[19] Taxable income is the amount by which gross income exceeds allowable deductions. IRC § 63.

[20] See S. Rep. No. 552, 91st Cong., 1st Sess., *reprinted in* [1969] U.S. Code Cong. & Ad. News 2027, 2315.

[21] *See, e.g.,* the statement at page 296 that a plaintiff with no net operating losses could deduct the entire amount of actual damages. Obviously, a plaintiff with no net operating losses can deduct no portion of the antitrust award, since the deduction is limited to the *lesser* of the compensatory amount or prior net operating losses.

that it represents taxable income,[22] the holding in *Hanover Shoe,* that reduction of antitrust damages by federal income taxes is improper because it constitutes double taxation, remains viable.

B. EFFECT OF NORFOLK

In *Norfolk & Western Railway Co.* v. *Liepelt,* 100 S.Ct. 755 (1980), this Court held that damages must be reduced by federal income taxes in a case brought under the Federal Employers' Liability Act. Although the Fifth Circuit cited *Norfolk* in connection with its holding that antitrust damages must be reduced by federal income taxes, *Norfolk* is easily distinguishable. Personal injury damages are totally exempt from federal income taxation under IRC § 104 (a)(2); therefore, the danger of double taxation that concerned the Court in *Hanover Shoe* was not present in *Norfolk.* Nowhere in *Norfolk* did the Court purport to overrule *Hanover Shoe,* and *Hanover Shoe* is not inconsistent with *Norfolk* either in holding or in rationale.

A grant of certiorari is justified in this case by the Fifth Circuit's unwarranted departure from the precedent set in *Hanover Shoe.* This case provides an excellent opportunity for the Court to re-examine *Hanover Shoe* in light of the enactment of section 186 and the decision in *Norfolk* and to reaffirm its continued vitality. Guidance from this Court is extremely desirable because of the complexity of section 186, its demonstrated susceptibility to misinterpretation, and the needless complexity that will be injected into already complex antitrust cases if misguided courts continue to disregard *Hanover Shoe.* Before *Norfolk,* most courts refused to countenance the consideration of income taxes in any type of damages suit because of the concomi-

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[22] Or, more specifically, to the extent that it would have represented taxable income but for the antitrust injury.

tant speculation and complexity that overshadow the real issues in the case.[23] Although speculation and complexity may not justify the exclusion of income taxes from consideration in cases in which they are legally relevant, certainly the Court should take every opportunity to prevent such speculation and complexity in cases in which income taxes are legally irrelevant.

Review by this Court is particularly justified in view of the universal application of the Fifth Circuit's holding that antitrust damages must be reduced by federal income taxes. The implications of the holding could affect not only the forty pending Bell cases, and not only other section 2 cases involving a regulated industry, but all private antitrust cases. Unless this Court checks such unwarranted departures from *Hanover Shoe,* antitrust trials, which already impose strains upon judicial and individual resources, could become needlessly mired in the complexities of federal income tax law. The prompt resolution of this issue would benefit courts and litigants alike.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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[23] *Norfolk & Western Railway Co.* v. *Liepelt,* 100 S.. Ct. 755, 757-58 (1980).

CERTIFICATE OF SERVICE

I certify that true and correct copies of this Petition for a Writ of Certiori were delivered to counsel for Respondent by placing same in the United States Mail, postage prepaid, addressed as follows:

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On the 5th day of August, 1980.

~~Louis Paine~~ David L. Orr

Supreme Court, U. S.
FILED
AUG 6 1980
MICHAEL RODAK, JR., CLERK

No. 80-175

In The

Supreme Court of the United States

October Term 1979

Woodlands Telecommunications Corporation,

Petitioner,

v.

Southwestern Bell Telephone Company,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Notice of Order Denying Petition for Rehearing and Rehearing *en banc*, May 27, 1980 ..... A-49

MID-TEXAS COMMUNICATIONS SYSTEMS, INC., ET AL.,
Plaintiffs-Appellees,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.,
Defendants,

SOUTHWESTERN BELL TELEPHONE COMPANY,
Defendant-Appellant.

No. 79-1221

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

MAY 1, 1980.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

Before AINSWORTH, INGRAHAM and GARZA, Circuit Judges.

AINSWORTH, Circuit Judge:

This is an antitrust action by Woodlands Telecommunications Corporation (WTC) for damages against Southwestern Bell Telephone Company (Bell) based on alleged violations of Sections 1 and 2 of the Sherman Anti-trust Act, 15 U.S.C. §§ 1 & 2. WTC, a new corporation formed for the purpose of providing telephone service within a new residential development outside of Houston, Texas, known as the Woodlands, based its suit principally on the refusal of the defendant to provide toll interconnection of the proposed telephone facility with the Bell System. The case was submitted to a jury on special interrogatories resulting in a verdict in favor of WTC against Bell for $18,369,827

damages which was trebled by the court in a final judgment for $55,109,481.[1] Defendant's motion for judgment n.o.v. or, in the alternative, for a new trial was denied. Bell has appealed from the judgment and asserted several grounds for error in the trial which raise novel questions of the proper accommodation of the antitrust laws with the regulation of the telecommunications industry. We reverse and remand for a new trial for reasons we shall detail.

I. INTRODUCTION

A. THE PERTINENT FACTS

We set forth an outline of those facts necessary to our decision. During the early 1970's Mitchell Energy & Development Corporation (Mitchell) began the planning of a new community to be located about 28 miles north of Houston. Eighteen thousand acres of vacant land was acquired by it for the building of a proposed city of an ultimate population of 150,000 persons by the 1990's. This community, to be known as The Woodlands, was to be developed by Mitchell's wholly owned subsidiary, The Woodlands Development Corporation. It qualified under the Urban Growth and New Community Development Act of 1970, 42 U.S.C. § 4501 et seq., which provides for government guarantees of the bonds of private new community developers up to a maximum of $50,000,000, and the Secretary of Housing and Urban Development granted the developers a bond guarantee for the maximum amount. 42 U.S.C. § 4514.

In early 1971 Mitchell's representatives met with those of various utility companies to investigate possible means of providing basic services to The Woodlands. Mitchell

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[1] Treble damages are provided for in section 4 of the Clayton Act, 15 U.S.C. § 15.

attempted to obtain financial assistance in the form of payments or percentage of revenues from these companies in return for the right to serve The Woodlands. Subsequently, representatives of Mitchell and Bell met to discuss the providing of telephone services in the proposed development. Bell expressed its willingness to furnish the telephone services required, but objected to giving financial assistance because it would be inconsistent with Bell's obligations as a regulated common carrier, and with general company policy. Mitchell then began investigating the possibility of establishing a new independent telephone company to serve The Woodlands.

In order for an independent telephone company to do business it was essential that its local lines interconnect with the existing Bell System interstate network so that its customers would have long-distance service. It was also necessary that an independent company have central office three-digit numbers known as NNX codes which are assigned and coordinated by the Bell System operating companies.

Bell claimed that in accordance with its published tariffs The Woodlands was located primarily in areas which were part of its Spring and Pinehurst exchanges. Twenty per cent of the site was in an exchange operated by Conroe Telephone Company, an independent. Mitchell negotiated with Mid-Texas Communications Systems, Inc. (Mid-Texas), an independent telephone company, which led to the formation of a new jointly owned independent to be known as Woodlands Telecommunications Corporation, plaintiff in this case. WTC then requested that Bell provide NNX codes and interconnection with the proposed new telephone system. Bell refused to interconnect voluntarily. It planned to serve the area itself. Bell contended that establishment of a new independent telephone company was contrary to the public interest and would be a

wasteful duplication of facilities with those of Bell. Bell stated that it would interconnect with WTC only if ordered to do so by state or federal regulatory authorities.

Accordingly, on November 9, 1972, WTC filed an informal complaint with the Federal Communications Commission (FCC) seeking an order under authority of section 201(a) of the Communications Act of 1934, 47 U.S.C. § 201(a), to require Bell to interconnect with its proposed facilities. Bell responded on December 13, objected to interconnection, and stated its own intention to serve The Woodlands. On March 20, 1973, the parties attended a conference with FCC staff members about the pending complaint of WTC. Bell's attorney stated at the meeting that if interconnection was ordered by FCC in connection with the proposed interstate service it would appeal the order to the courts. Intrastate connection would still require compliance with the Texas statutory procedure. Bell insisted upon a full evidentiary hearing on the record before the FCC but the Commission decided that such a hearing was not required in light of the need for expedited decision and thus the matter was to be determined by FCC on written submission of the parties. After further discussion between WTC and Bell representatives, WTC concluded on July 11 to discontinue its efforts to serve The Woodlands, thereby clearing the way for Bell to do so, and on August 2, a majority of WTC directors voted to withdraw the FCC complaint. The parties dispute the circumstances of the withdrawal of the complaint, WTC contends it was economically coerced by defendant Bell, which responds that the withdrawal was voluntarily made.

B. THE PROCEEDINGS IN THE DISTRICT COURT

WTC filed this suit on November 19, 1973 against Bell and American Telephone & Telegraph Company (AT&T)

alleging a conspiracy to monopolize and restrain trade in the furnishing of telecommunications services in The Woodlands in violation of the Sherman Antitrust Act. Bell counterclaimed against WTC and cross-claimed against Mid-Texas, Mitchell and Woodlands Development Corporation, also on Sherman Act grounds. Defendants' motion to dismiss the complaint on the basis that it was immune from antitrust action because of the provisions of the Communications Act of 1934 (47 U.S.C. § 151 *et seq.*) was denied by the district court. *See Woodlands Telecommunications Corp.* v. *AT&T,* 447 F.Supp. 1261 (S.D.Tex. 1978). Thereafter, during the course of the trial AT&T was dismissed as a defendant. As previously indicated, the jury's verdict was in favor of WTC and Bell brought this appeal.

On appeal, Bell raises four principal issues. First, that the district court erred in applying the antitrust laws to an interconnection dispute which was subject to state and federal regulations, under a standard inconsistent with the antitrust standard of competition. Second, Bell contends that under the circumstances it is immune from antitrust liability because it is entitled to the protection provided by the doctrine enunciated in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) and *United Mine Workers* v. *Pennington,* 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), the so-called *Noerr-Pennington* doctrine, which protects the rights of freedom of expression and resort to governmental processes. Bell's third issue is that the trial judge erroneously limited Bell's defense on the impact of regulation by refusing to give any instructions to the jury on the nature and effect of federal and state regulation of the telecommunications industry in connection with the issues before it. Bell also contends that the damages

assessed were based upon a damage model improper as a matter of law. We discuss these issues in order.[2]

II. IMPLIED IMMUNITY

Bell's primary contention is that the district court erred in applying the antitrust laws to an interconnection dispute which was subject to regulation both by state and federal authorities. Thus Bell asserts that antitrust liability cannot be imposed upon it for failure voluntarily to interconnect with WTC. The federal regulatory authority is found in section 201(a) of the Communications Act, 47 U.S.C. § 201(a), which reads as follows:

> It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

Section 201(a) does not expressly exempt a carrier from antitrust liability for refusing a request to interconnect,[3]

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[2] In light of our resolution of the main issues in this case, we need not discuss Bell's other contentions.

[3] The Communications Act does provide explicit exemptions for telephone company consolidations and acquisitions. 47 U.S.C. §§ 221(a), 222(c)(1). The existence of an explicit exemption in one part of the Act does not provide authority for the proposition that other actions not directly covered are impliedly exempt. *Industrial Communications Systems, Inc.* v. *Pacific Tel. & Tel. Co.*, 505 F.2d 152, 156 (9th Cir. 1974). The existence of explicit immunities may indicate that Congress did not intend for courts to imply exemptions in other parts of the statute. *See California*

but Bell argues that it would be unfair to subject it to antitrust liability in light of the FCC's ultimate statutory control over interconnection. Under this construction by Bell, the public interest standard controlling interconnection under section 201(a) is inherently inconsistent with the anticompetitive standard for assessing liability under the antitrust laws. Bell asserts a right—and indeed an obligation—to oppose interconnection in those cases where it believes that the public interest would not thereby be served, subject only to review of its action by the FCC pursuant to section 201(a). To allow both antitrust and regulatory standards to operate independently would, it is contended, place Bell in a dilemma. Either Bell would be forced to approve all interconnection requests regardless of the public interest involved, or it could continue to refuse those requests it deems not in the public interest only at risk of substantial antitrust liability. Bell asserts that the only fair method of resolving the matter is for the court to hold that section 201(a) creates an implied immunity from the antitrust laws.[4]

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v. *FPC*, 369 U.S. 482, 485, 82 S.Ct. 901, 904, 8 L.Ed.2d 54 (1962); *United States* v. *Borden Co.*, 308 U.S. 188, 200-01, 60 S.Ct. 182, 189-90, 84 L.Ed. 181 (1939); *Cain* v. *Air Cargo, Inc.*, 599 F.2d 316, 320 (9th Cir. 1979). In order to assure the proper relationship between regulatory provisions and antitrust safeguards, courts must inquire if "application of the antitrust laws would seriously undermine a comprehensive regulatory scheme," even in the absence of explicit exemption. *See* Note, *AT&T and the Antitrust Laws: A Strict Test for Implied Immunity*, 85 Yale L.J. 254, 269-70 n.76 (1975). *Cf. Pan Amer. World Airways, Inc.* v. *United States*, 371 U.S. 296, 320-21, 83 S.Ct. 476, 490, 9 L.Ed.2d 325 (1963) (Brennan, J., dissenting).

[4] Bell also argues that federal and state regulation of the telecommunications industry is so pervasive as to warrant blanket immunity for its actions in this case. *See United States* v. *National Ass'n Sec. Dealers, Inc.*, 422 U.S. 694, 730, 95 S.Ct. 2427, 2448, 45 L.Ed.2d 486 (1975); *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 387-89, 93 S.Ct. 647, 661-62, 34 L.Ed.2d 577 (1973); *Pan Amer. World Airways, Inc.* v. *United States*, 371 U.S.

The Supreme Court has repeatedly held that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 350-51, 83 S.Ct. 1715, 1734-35, 10 L.Ed.2d 915 (1963) (footnotes omitted). *See Gordon* v. *New York Stock Exchange, Inc.,* 422 U.S. 659, 682, 95 S.Ct. 2598, 2611, 45 L.Ed.2d 463 (1975). The unwillingness of the courts to imply antitrust immunity is based on recognition that the "antitrust laws represent a fundamental national economic policy" which should not be lightly disturbed. *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 218, 86 S.Ct. 781, 784, 15 L.Ed.2d 709 (1966). Therefore, immunity will be implied only if necessary to permit the regulatory scheme to function, and then only to the "minimum extent necessary." *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357, 83 S.Ct. 1246, 1257, 10 L.Ed.2d 389 (1963).

296, 300-01, 83 S.Ct. 476, 480, 9 L.Ed.2d 325 (1963). Bell contends that immunity is justified because "scarcely a single business act is free from continuous regulation or at least [some] administrative governmental review." *Carter* v. *AT&T,* 365 F.2d 486, 495 (5th Cir.), *cert. denied,* 385 U.S. 1008, 87 S.Ct. 714, 17 L.Ed.2d 546 (1967). *See Western Electric Co.* v. *Milgo Electronic Corp.,* 568 F.2d 1203 (5th Cir.), *cert. denied,* 439 U.S. 895, 99 S.Ct. 255, 58 L.Ed.2d 241 (1978). Neither *Carter* nor *Western Electric* considered the immunity question directly. *Carter* concerned the application of the doctrine of primary jurisdiction, whereas *Western Electric* involved the appealability of an FCC order. Indeed, courts have often rejected the argument that antitrust immunity should be implied because of the pervasiveness of federal and state regulation. *See, e. g., Essential Communications Systems, Inc.* v. *AT&T,* 610 F.2d 1114 (3d Cir. 1979); *MCI Communications Corp.* v. *AT&T,* 462 F.Supp. 1072, 1080-82 (N.D.Ill.1978); *United States* v. *AT&T,* 427 F.Supp. 57, 60-61 (D.D.C. 1976), *cert. denied,* 434 U.S. 966, 98 S.Ct. 507, 54 L.Ed.2d 452 (1977); *Macom Products Corp.* v. *AT&T,* 359 F. Supp. 973, 976 (C.D.Cal.1973). Federal and state regulation of the telecommunications industry is not so pervasive as to justify a blanket immunity.

In the FCC's determination of the "public interest" question under the Act there is no doubt that competition is a relevant factor. *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 94, 73 S.Ct. 998, 1004, 97 L.Ed. 1470 (1953). Competition per se, however, is not the sole touchstone for decision since competition is not the only consideration. *RCA, supra,* 346 U.S. at 93, 73 S.Ct. at 1003; *Hawaiian Telephone Co.* v. *FCC,* 498 F.2d 771, 775-77 (D.C.Cir.1974). Rather, the FCC must consider all factors relating to the "public convenience and necessity." *Hawaiian Telephone,* 498 F.2d at 776. In general, the public interest is to be considered in light of the overall purpose of the Communications Act "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ." 47 U.S.C. § 151. As decisions under section 201(a) reveal, the FCC considers a number of specific non-competition-related factors in determining the public interest in interconnection cases. *See, e. g., Oklahoma-Arkansas Telephone Co.* v. *Southwestern Bell Telephone Co.,* 6 F.C.C. 809 (1939) (adequacy of existing service); *In the Matter of Western Union Telegraph Co.,* 17 F.C.C. 152, 171-75 (1952) (lack of evidence of public necessity resulting in a "blank check" for competitor to serve most profitable routes if interconnection were ordered). Since an analysis of competitive effects is not decisive, the FCC may not adequately safeguard antitrust interests. Thus, in the absence of clear conflict, the antitrust laws must be permitted to operate.

WTC argues that the Supreme Court's decision in the antitrust case of *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973), controls the question of Bell's implied immunity here. In that case,

Otter Tail Power Company, an electric utility that generated and transmitted electric power to hundreds of communities in Minnesota, North Dakota, and South Dakota, allegedly violated the antitrust laws by a number of predatory actions. Within each town, Otter Tail operated pursuant to a 10-20-year franchise granting monopoly status in the locality. In four communities, the citizens voted to establish independently owned systems at the expiration of the Otter Tail franchise. Localities wishing to establish independent systems either had to obtain wholesale power directly from Otter Tail itself or purchase it elsewhere and have Otter Tail "wheel" the power over its transmission lines. When asked to provide or wheel power, Otter Tail refused. Two localities filed complaints before the Federal Power Commission (FPC) to compel Otter Tail to interconnect. One town successfully pursued its claim, but the other withdrew its complaint and restored Otter Tail's franchise. Two other towns were able to contract for power elsewhere only to have Otter Tail refuse to wheel it. In addition, Otter Tail had either initiated or sponsored litigation unrelated to the FPC proceedings which had the effect of frustrating the towns' plans by interfering with their ability to float revenue bonds needed to finance the independent systems.

Otter Tail contended that it was insulated from antitrust liability because of existing federal regulation, relying specifically on section 202(b) of the Federal Power Act, which grants FPC authority to compel interconnection if found to be "necessary or appropriate in the public interest." 16 U.S.C. § 824a(b). The Supreme Court rejected the argument on the ground that the statutory provision was designed to foster voluntary interconnection. After reviewing the relevant legislative history the Supreme Court held that Congress rejected a pervasive regulatory

scheme "in favor of voluntary commercial relationships. When these relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws." *Otter Tail, supra,* 410 U.S. at 374, 93 S.Ct. at 1028. Thus, there was no basis for concluding that Congress intended to displace the antitrust laws in that case.

Relying on *Otter Tail,* the district court in the present case held that Bell was not entitled to antitrust immunity because its initial decision whether to interconnect was a matter of business judgment and was not the product of "regulatory supervision." *Woodlands Telecommunications Corp.* v. *AT&T,* 447 F.Supp. 1261, 1265-66 (S.D.Tex.1978). The district court noted that "[i]f the refusal to interconnect is for the express purpose of excluding competition, as is alleged in this case, the antitrust laws may provide another remedy in addition to section 201(a)." *Woodlands Telecommunications, supra,* 447 F.Supp. at 1266.

However, to categorize Bell's decision as purely voluntary or only a matter of business judgment is somewhat misleading. As Bell argues, its decision is not voluntary in the full sense of the word because Bell conforms its policies to the regulatory provision by considering factors related to the public interest when deciding whether to interconnect. Thus, Bell asserts that it would be inherently unfair to subject it to antitrust liability for decisions which it considers are taken in the public interest.

Bell's position is not without merit. Undoubtedly there may be situations where interconnection should not be permitted since it would not be in the public interest. To argue otherwise would be to ignore the effect of the statutory inquiry; the statute envisions interconnection requests

that are both in the public interest and those that are not. When an interconnection is not in the public interest, Bell's refusal is obviously supportable, for without the refusal, an undesirable interconnection would occur. In those instances where interconnection is not in the public interest, the statutory framework places the initial onus of refusal on Bell. To create the potential for antitrust liability where Bell is acting to safeguard the public interest would be contrary to public policy. Fairness to the regulated industry is an important factor, therefore, in determining whether antitrust immunity exists. *See* Note, *Antitrust and Regulated Industries: A Critique and Proposal for Reform of the Implied Immunity Doctrine,* 57 Tex.L.Rev. 751, 757, 787-88 (1979).

Nevertheless, it would be improper to imply that all decisions refusing interconnection are immune. Though the refusal may be based upon articulable concerns of public policy, it may also be possible to rationalize a decision whose purpose is anticompetitive. While section 201(a) provides a mechanism to compel interconnection, the FCC cannot always provide complete relief to an injured competitor. The FCC's mandate is not explicitly centered upon competitive effects so that its inquiry into antitrust concerns may be obscured. Nor is the FCC empowered to award damages in favor of the injured competitor.[5] Thus, an antitrust court has an important role in preventing misuse of the public interest standard. Accordingly, section 201(a) of the Communications Act does not as matter of law automatically grant Bell immunity from the effects of the antitrust laws.[6]

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[5] *See generally United States* v. *AT&T,* 461 F.Supp. 1314, 1328 n. 43 (D.D.C.1978). *See also Nader* v. *FCC,* 520 F.2d 182, 206 (D.C.Cir.1975).

[6] *See generally MCI Communications Corp.* v. *AT&T,* 462 F.Supp. 1072, 1089-96 (N.D.Ill.1978) (no immunity for refusing to inter-

Nevertheless, to the extent that Bell based its decision here on articulable concerns relating to the public interest as defined in section 201(a), it is entitled to a measure of protection from the effects of the antitrust laws. As we discuss later in Section III of this opinion, Bell's claimed reliance on public interest concerns in denying an interconnection request are relevant to an assessment of Bell's alleged monopolistic purpose or intent. Thus, while we affirm the district court's ultimate holding that Bell's actions are not immune as a matter of law, we disagree with the district court's analysis that section 201(a) is unrelated to Bell's initial decision whether to interconnect. Throughout the course of proceedings, Bell has argued that its decision was affected by concerns related to the public interest as provided in section 201(a). Bell's action may have been so constrained, and its actions must be considered in a different light than if no regulatory provision which could mandate interconnection existed, for it is

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connect with specialized communications carrier); *United States* v. *AT&T*, 461 F.Supp. 1314, 1320-30 (D.D.C.1978) (no immunity for alleged predatory practices including refusals to interconnect with long-distance telephone facilities). *See also Essential Communications Systems, Inc.* v. *AT&T*, 610 F.2d 1114 (3d Cir. 1979); *Jarvis, Inc.* v. *AT&T*, 481 F.Supp. 120, 123 (D.D.C.1978).

In its brief plaintiff also calls to our attention the position enunciated in the amicus brief of FCC filed in *United States* v. *AT&T*, 427 F.Supp. 57, 58 (D.D.C.1976), *cert. denied*, 429 U.S. 1071, 98 S.Ct. 507, 54 L.Ed.2d 452 (1977). There it was alleged that AT&T had refused interconnection with new independent telephone companies organized to serve new communities. *Memorandum of FCC as Amicus Curiae, reprinted* at 62 F.C.C. 1102, 1130. The FCC's brief stated in part that:

> [f]or purposes of communications policy, interconnection in that circumstance would appear to be a neutral act; if it were required for reasons of competition, and if there were no affirmative communications policy reasons to *forbid* interconnection, maintenance of an antitrust action would not necessarily interfere with Commission regulation.

62 F.C.C.2d at 1112-13 (emphasis in original).

entirely plausible that its initial decision whether to interconnect was closely tied to the public interest inquiry under section 201(a).

Bell also contends that its actions in this case were immune from antitrust liability by virtue of state regulation. Under Texas law applicable at the time of this suit,[7] telephone companies were under an obligation to interconnect with other companies upon request, Tex.Rev.Civ. Stat. Ann. art. 1427, except that no telephone company could be compelled to interconnect for "any message originating at any point on its own lines." Tex.Rev.Civ.Stat. Ann. art. 1429. There was no statewide commission to resolve disputes concerning interconnection, but they were submitted to the local city councils or county commissioner's court which could order interconnection if found to be "necessary for public convenience." Tex.Rev.Civ.Stat. Ann. art. 1430. Failure to comply with an order from the appropriate local authority could result in a maximum penalty of ten dollars per day. Tex.Rev.Civ.Stat.Ann. art. 1431. Bell contends that local authorities were required to deny an interconnection request if an existing telephone company was already serving the area, citing in support of its contention *Ohmes* v. *General Telephone Co.*, 384 S.W.2d 796, 799 (Tex.Civ.App. — Amarillo 1964, writ ref'd).

As with federal regulatory provisions, there exists a strong presumption against finding antitrust immunity on the basis of state regulation. *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 595-98 & nn. 36, 37, 96 S.Ct. 3110, 3120 & nn.

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[7] In 1976, Texas enacted a new statute creating a state-wide regulatory commission with jurisdiction over the telecommunications industry. Tex.Rev.Civ.Stat.Ann. art. 1446c (Vernon Supp.1979). The new law treats interconnections in a manner similar to section 201(a) in that interconnection refusals are subject to review by a centralized commission under a public interest standard. Tex.Rev.Civ.Stat.Ann. art. 1446c § 61(2) (Vernon Supp.1979).

36, 37, 49 L.Ed.2d 1141 (1976). Thus, the mere possibility of a conflict between state regulation and federal antitrust standards is insufficient to support a finding of immunity. *Cantor, supra,* 428 U.S. at 596, 96 S.Ct. at 3120.[8]

A review of applicable Texas law demonstrates that immunity from federal antitrust law is not "imperative in the continued effective functioning" of the state regulatory scheme. *Cantor, supra,* 428 U.S. at 595-96 n. 36, 96 S.Ct. at 3120-21 n. 36. Like its federal counterpart, Texas law relies, in the first instance, on the decision of each individual telephone company whether to interconnect. Indeed, Texas law is substantially less potent in that no statewide regulatory commission was available to force interconnection, but control, to the extent that it existed at all, was exercised by decentralized local authorities. *See* Fulda, *Telephone Regulation in Texas: Should Regulation by Cities Be Replaced by a State Commission?* 45 Tex.L.Rev. 611, 618-20 (1967). Accordingly, since Bell's actions were not compelled by state regulatory actions they were not immune by virtue of state regulation. *See Interconnect Planning Corp.* v. *AT&T,* 465 F.Supp. 811 (S.D.N.Y. 1978).

III. NOERR-PENNINGTON

Bell's second major contention is that its actions are immune from antitrust liability under the so-called *Noerr-Pennington* doctrine. The guiding principle behind the *Noerr-Pennington* immunity is to insure "uninhibited access to government policy makers." *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.,* 424 F.2d 25, 32

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[8] *See generally Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 791, 95 S.Ct. 2004, 2015, 44 L.Ed.2d 572 (1975) (antitrust immunity should be recognized only where state law compels action taken by regulated company). *See also Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345, 357, 95 S.Ct. 449, 456-57, 42 L.Ed.2d 477 (1974).

(1st Cir.), *cert. denied,* 400 U.S. 850, 91 S.Ct. 54, 27 L.Ed.2d 88 (1970). Initially the doctrine was applied to efforts to influence legislative and executive action. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) (publicity campaign by railroad companies designed to obtain legislation adverse to trucking industry); *United Mine Workers* v. *Pennington,* 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965) (joint effort by employers and union to influence public offcials even though intended to eliminate competition). It is now clear, however, that *Noerr-Pennington* immunity extends to attempts to influence judicial and administrative actions since the "right to petition extends to all departments of the Government." *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 510, 92 S.Ct. 609, 611-12, 30 L.Ed.2d 642 (1972). See generally Fishel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine,* 45 U.Chi.L.Rev. 80, 96–104 (1977).

Bell contends that under *Noerr-Pennington* antitrust liability cannot be imposed for actions taken to bring important questions before governmental authorities for resolution. Thus Bell asserts that its refusal to interconnect is protected since refusal was a necessary first step in bringing the dispute before the FCC.

The crux of the *Noerr-Pennington* immunity is the need to protect efforts directed to governmental officials for the purpose of seeking redress. The doctrine has been applied only to situations involving direct actions made to influence governmental decisionmaking. *See, e. g., Noerr, supra* (publicity campaign designed to influence passage of state laws); *California Motor, supra* (instituting state and federal proceedings to defeat award of operating rights); *Franchise Realty Interstate Corp.* v. *San Francisco Local*

Joint Executive Board, 542 F.2d 1076 (9th Cir. 1976) (direct lobbying efforts opposing building permit grants before zoning board), *cert. denied,* 430 U.S. 940, 97 S.Ct. 1571, 51 L.Ed.2d 787 (1977); *Metro Cable Co.* v. *CATV of Rockford, Inc.,* 516 F.2d 220 (7th Cir. 1975) (making representations to local city council concerning cable television franchise). Bell's initial decision to refuse interconnection was not directed toward any governmental agency or official. Bell was not required to consult with the FCC or obtain approval of its decision to refuse interconnection. Therefore, refusal was a necessary first step if FCC action was to occur. Until the governmental process is initiated however, *Noerr-Pennington* immunity should not extend to actions occurring in an essentially private context. Bell's initial refusal to interconnect, therefore, was not an attempt to influence governmental action so as to warrant protection under *Noerr-Pennington.*

Bell contends that this court's decision in *International Telephone & Telegraph Corp.* v. *United Telephone Co. of Florida,* 550 F.2d 287 (5th Cir. 1977), controls this case. In *United Telephone,* plaintiff ITT entered into an agreement with the developers of an extensive real estate project, whereby ITT would provide the equipment for a central telephone terminal system. In order to provide service to areas outside the development, the developers requested interconnection with United's facilities. The developers did not have an operating certificate from the state regulatory commission, which was a prerequisite to operation. Accordingly, United filed a complaint with the Florida Public Service Commission questioning the legality of the proposed interconnection under state law, but stating its willingness to interconnect to the extent that the operation was legal. The developers, joined by intervenor ITT, moved to dismiss the complaint, which was denied by

the Commission, and neither party appealed from the adverse decision. The Commission later terminated the proceedings as moot when the developers abandoned their effort to install the telephone system. The Commission said in its order that the proposal in fact violated state law since the developers did not have a certificate of public convenience and necessity. ITT then brought suit for damages against United under the antitrust laws, alleging that United had filed a "sham" complaint with the Commission. This court held that the antitrust suit was barred by operation of the *Noerr-Pennington* doctrine since United properly brought the dispute before the Commission which was "the authority to determine whether the actions herein would be unlawful under Florida law." *United Telephone, supra,* 550 F.2d at 289.

Bell asserts that it did nothing more than bring this matter before the FCC which had the authority to determine the validity of the refusal under federal law to interconnect. The cited case is distinguishable, however, from the present case. First, in *United Telephone,* the regulatory scheme permitted United itself to commence administrative review by the filing of a complaint, unlike the situation in the present case where Bell did not initiate the FCC proceeding. The complaint in *United Telephone* did not allege a series of wrongful acts, but contended that the filing of the complaint itself before the state regulatory agency was sufficient to subject United to antitrust liability. In the present case, WTC alleges anticompetitive actions beyond the scope of the FCC action. The regulatory agency in *United Telephone* actually decided the merits of the dispute in favor of United, and it would be difficult to conclude that the filing of a complaint constitutes a sham where the party seeking relief actually prevails. *See, e. g., Taylor Drug Stores, Inc.* v. *Associated Dry Goods Corp.,* 560 F.2d

211, 213 (6th Cir. 1977); *Franchise Realty, supra,* 542 F.2d at 1079; *Central Bank of Clayton* v. *Clayton Bank,* 424 F.Supp. 163, 167 (E.D.Mo.1976), *aff'd mem.,* 553 F.2d 102 (8th Cir.), *cert. denied,* 433 U.S. 910, 97 S.Ct. 2978, 53 L.Ed.2d 1095 (1977). *See generally* 1 P. Areeda & D. Turner, Antitrust Law § 203 (1978). In the present case, the complaint was withdrawn prior to final FCC determination. The instant case is clearly different under the circumstances. Accordingly, we hold that Bell's initial decision refusing interconnection does not fall within the protection afforded by the *Noerr-Pennington* doctrine.

WTC also categorized Bell's procedural moves opposing its complaint before the FCC as "delaying tactics" which constituted anticompetitive conduct. For example, WTC argued that Bell's insistence upon a full hearing on the record rather than agreeing to follow the written submission procedure suggested by the FCC staff was evidence of improper tactics. It is clear, however, that under *California Motor* Bell had a right to contest the FCC complaint regardless of any anticompetitive intent. *California Motor, supra,* 404 U.S. at 511, 92 S.Ct. at 612. WTC argues that Bell's actions before the FCC are not immune because they fall within the so-called "sham exemption" to *Noerr-Pennington* immunity which prevents a party from misusing governmental processes by employing means that achieve "substantive evils." *California Motor, supra* 404 U.S. at 513–16, 92 S.Ct. at 613–14. *See Woods Exploration & Producing Co.* v. *Aluminum Company of America,* 438 F.2d 1286, 1296–98 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1975).

In assessing the applicability of the "sham exemption" to Bell's direct representations before the FCC, it is important to note that it should be read narrowly in order to protect the first amendment right of access to adminis-

trative proceedings. *Franchise Realty, supra,* 542 F.2d at 1082. We must be particularly careful in considering allegations of sham in situations like the present one where the applicant withdrew its claim prior to final agency resolution since the administrative determination may benefit the factfinder in characterizing the challenged action. *See* 1 P. Areeda & D. Turner, Antitrust Law § 203b (1978). *Cf. Israel* v. *Baxter Laboratories, Inc.,* 466 F.2d 272, 279-80 (D.C.Cir.1972) (case alleging improper conduct before administrative agency deferred pending remand to the agency to determine issues relating to the supposed sham conduct).

In the present case, it is difficult to understand how Bell's direct dealings before the FCC can fairly be categorized as a sham. As the Supreme Court noted in *California Motor,* "[O]pponents before agencies or courts often think poorly of the other's tactics, motions, or defenses and may readily call them baseless. One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused." *California Motor, supra,* 404 U.S. at 513, 92 S.Ct. at 613. *See MCI Communications Corp.* v. *AT&T,* 462 F.Supp. 1072, 1102–04 (N.D.Ill.1978).[9]

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[9] Indeed, WTC has not alleged a consistent pattern whereby Bell refused interconnection requests in all cases and then raised points of procedure for the purposes of delay before the FCC. In fact, Bell has voluntarily interconnected with other independent phone companies in the past. Thus, the situation is unlike *California Motor* where it was contended that the various conspirators opposed every effort by a new competitor to enter the market by initiating administrative proceedings "without probable cause and regardless of the merits." *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 512, 92 S.Ct. 609, 612, 30 L.Ed.2d 642 (1972). *Cf. Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 372, 93 S.Ct. 1022, 1027, 35 L.Ed.2d

In summary, we hold that Bell is not entitled to immunity under the *Noerr-Pennington* doctrine since its refusal to interconnect was not directed toward influencing governmental action. Its direct dealings with the FCC, however, are entitled to that protection.[10]

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359 (1973) (power company instituted litigation against four municipalities that were attempting to create independent systems). *See generally* Note, *Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process,* 86 Harv.L.Rev. 715 (1974).

[10] In this regard, Bell requested and was denied an instruction specifically setting forth the application of the *Noerr-Pennington* doctrine with respect to its opposition to WTC's complaint before the FCC. In particular Bell requested an instruction to the effect:

> WTC claims that Southwestern Bell acted unlawfully in opposing WTC's informal complaint before the FCC to compel Southwestern Bell to interconnect, and in insisting that the FCC hold a formal evidentiary hearing to decide the matter. You are instructed that to demand a hearing before a court or an administrative agency does not violate the Sherman Act, even if such demand is made as a joint and concerted action, and even if the intent or purpose of the demand is to eliminate competition, unless that demand is purely and simply a sham. Therefore, you are instructed that, even if you believe that Southwestern Bell and AT&T combined or conspired to restrain trade as I have defined those terms to you, you may not find that Defendants violated the Sherman Act unless WTC specifically proves by a preponderance of the evidence that Southwestern Bell opposed WTC's informal complaint before the FCC and demanded a hearing without any probable cause and totally regardless of the merits of Southwestern Bell's or AT&T's position under the Communications Act.
>
> You are instructed that petitioning an administrative agency such as the FCC can result in certain delays because administrative procedures are often time consuming. Such delays are a price which businesses have to pay in our complex, highly regulated economy. Southwestern Bell and AT&T cannot be held responsible for the delays occasioned solely by adherence to the statutory provisions and procedural requirements of the FCC. Such delays cannot, as a matter of law, form a basis for the finding of an antitrust violation.

Bell's Requested Instruction # 8 (footnotes omitted). While the district court instructed the jury on the import of *Noerr-Pennington* in general, we believe that in substance Bell's requested specific instruction was proper.

IV. INSTRUCTIONS TO THE JURY

Bell contends that the district court erred by failing to instruct the jury concerning the effect of regulation as it related to Bell's actions in refusing interconnection with WTC. The Supreme Court has recognized that consideration of federal and state regulation is proper in certain instances even after the issue of antitrust immunity has been resolved. *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 627, 94 S.Ct. 2856, 2872-73, 41 L.Ed.2d 978 (1975) (application of the antitrust laws to bank mergers "must take into account the unique federal and state regulatory restraints" on defendant's conduct). *See Silver* v. *New York Stock Exchange,* 373 U.S. 341, 360-61, 83 S.Ct. 1246, 1258-59, 10 L.Ed. 2d 389 (1963). The Ninth Circuit also has noted the continuing significance of regulation:

> This is not to say that the nature and extent of regulation is, in the absence of an exemption, irrelevant from a factual perspective. The impact of regulation on pricing and other competitive factors is too obvious to be ignored. In the absence of an exemption claim, the fact of regulation is significant, but not because it embodies a doctrinal scheme different from the antitrust law; the sole legal perspective is that afforded by the antitrust law. Rather, the impact of regulation must be assessed simply as another fact of market life.

International Telephone & Telegraph Corp. v. *General Telephone and Electronics Corp.,* 518 F.2d 913, 935-36 (9th Cir. 1975) (footnote omitted). Thus, the anti-trust laws are not so inflexible as to deny consideration of governmental regulation. "[A]ntitrust courts can and do consider the particular circumstances of an industry and therefore adjust their usual rules to the existence, extent, and nature of regulation. Just as the administrative agency must consider the competitive premises of the antitrust laws, the antitrust court must consider the peculiarities of an indus-

try as recognized in a regulatory statute." 1 P. Areeda & D. Turner, Antitrust Law § 223d (1978). *See Jacobi* v. *Bache & Co.*, 520 F.2d 1231, 1237-39 (2d Cir. 1975) (rejecting application of per se rule in light of regulation of stock exchange), *cert. denied*, 423 U.S. 1053, 96 S.Ct. 784, 46 L.Ed. 2d 642 (1976). *See also Almeda Mall, Inc.* v. *Houston Lighting & Power Co.*, ... F.2d ..., ... (5th Cir. 1980) (No. 78-1586, April 11) (slip op. at 4834-35). The fact of regulation may therefore operate within the confines of the applicable antitrust laws.

The gravamen of WTC's theory of liability is that Bell violated section 2 of the Sherman Act by using monopoly power in the long-distance telephone market to hinder competition in the local Woodlands market.[11] WTC claims that Bell's refusal to deal with WTC in the long-distance market constituted a willful misuse of its monopoly power in violation of the antitrust laws. Illegal monopolization under section 2 has two distinct elements: (1) possession of monopoly power in the relevant market, and (2) "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966). *See generally Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 271-76 (2d Cir. 1979), *cert. denied*, ... U.S. ..., 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980). A monopolist may not arbitrarily or invidiously use its monopoly power in one market, even if lawfully obtained, to harm competition in another market. *See, e.g., United States* v. *Griffith*, 334 U.S. 100, 107-08, 68 S.Ct. 941,

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[11] WTC originally alleged violations of both section 1 and section 2 of the Sherman Act. The subsequent dismissal of defendant AT&T, however, removed the section 1 conspiracy claims. Accordingly, WTC's claim against Bell was premised solely on section 2.

945-46, 92 L.Ed. 1236 (1948); *Smith-Kline Corp.* v. *Eli Lily & Co.*, 575 F.2d 1056 (3d Cir.), *cert. denied*, 439 U.S. 838, 99 S.Ct. 123, 58 L.Ed.2d 134 (1978); *Pacific Coast Agricultural Export Association* v. *Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959, 96 S.Ct. 1741, 48 L.Ed.2d 204 (1976). Bell contends that the effect of regulation is relevant to the issue of the existince of monopoly power and misuse of that power.

A. REGULATION AND MONOPOLY POWER

Monopoly power exists if a firm has "the power to control prices or exclude competition." *Grinnell, supra*, 384 U.S. at 571, 86 S.Ct. at 1704. In the present case, the district court instructed the jury that:

> Southwestern Bell has "monopoly power" in the relevant market in this case in that Southwestern Bell controlled the essential facilities of long-distance lines and NNX codes to which competitors must have access to do business. You are further instructed that the relevant market is the providing of telephone services to The Woodlands. Because the court has determined that Southwestern Bell possessed monopoly power in the relevant market, you need not deliberate on this element, but rather you are to regard it as proven by by WTC by a preponderance of the evidence.

R. at 624. Thus, the district court withdrew this critical issue from the jury's consideration. Bell argues that this instruction was erroneous since it could not exclude competition from The Woodlands market given the existence of section 201(a) by which a competitor may petition the FCC for an order to interconnect. Specifically, Bell requested and was refused an instruction to the effect that:

> You are instructed that the mere fact that Southwestern Bell may have had a monopoly in the provision of telephone service in certain markets or areas in the

> sense that it had a large share or the entire share of those markets would not be sufficient to establish that Southwestern Bell possessed monopoly power. As I instructed you earlier, Southwestern Bell as a regulated public utility under both state and federal law was under a common carrier duty to serve all would-be subscribers in its service areas upon demand.
>
> • • • •
>
> In determining whether Southwestern Bell had monopoly power in the sense that it had the power to exclude competition, you are instructed that both Texas and federal law provided procedures to compel Southwestern Bell to connect with other telephone companies where certain conditions were met. To establish that Southwestern Bell had monopoly power, therefore, WTC must prove by a proponderance of the evidence that despite the authority of the FCC to order interconnection, Southwestern Bell nonetheless had the power to exclude competition. In this connection, I must remind you that my earlier instructions concerning Southwestern Bell's right to oppose WTC's informal complaint to the FCC and to insist upon a formal evidentiary hearing applies equally to the alleged offense of monopolization.

Bell's Requested Instruction # 13 (footnote omitted).

In determining the proper instruction to the jury in this regard, the court should have been aware that in specific circumstances regulatory control is relevant to the existence of monopoly power and may even prohibit a finding of such power as a matter of law. *See, e.g., Travelers Insurance Co.* v *Blue Cross of Western Pennsylvania,* 361 F. Supp. 774, 780 (W.D.Pa.1972) (company was not a monopolist since it lacked control over rate-making mechanism), *aff'd,* 481 F.2d 80 (3d Cir.), *cert. denied,* 414 U.S. 1093, 94 S.Ct. 724, 38 L.Ed.2d 550 (1973); *Redwing Carriers, Inc.* v. *McKenzie Tank Lines,* 443 F.Supp. 639, 641 (N.D.Fla.1977) (price for transportation of item set by regulatory agency

so fact that one shipper may obtain a monopoly is irrelevant since price will be unaffected) *aff'd,* 594 F.2d 114 (5th Cir. 1979); *Nankin Hospital* v. *Michigan Hospital Service* 361 F.Supp. 1199, 1209-10 & n. 33 (E.D.Mich.1973) (company does not possess monopoly power since rates controlled and actively reviewed by state insurance commission). *Cf. International Railways of Central America* v. *United Brands Co.* 532 F.2d 231, 240 (2d Cir. 1976) (consent decree which fixed freight rates removed ability of banana grower to coerce lower freight rates from railroad and thus negated finding of monopoly power), *cert. denied,* 429 U.S. 835, 97 S.Ct. 101, 50 L.Ed.2d 100 (1976).

We hold that the district court erred in directing the jury to assume the existence of monopoly power while at the same time refusing to instruct the jury that there existed a regulatory mechanism to compel interconnection. The regulatory procedure was directly relevant to Bell's power to exclude competition. Undoubtedly, section 201(a) must be taken into account in any consideration of Bell's decision on interconnection. *See* Watson & Brunner, *Monopolization by Regulated "Monopolies": The Search for Substantive Standards,* 22 Antitrust Bull. 559, 573-74 (1977). Whether Bell possessed sufficient power to exclude competition in light of section 201(a) is a question for the jury's consideration. Accordingly, the district court should have instructed the jury on the applicable regulatory provision pertaining to interconnection and on the jury's duty "to take into account the unique federal and state regulatory restraints." Thus the jury should have been permitted fairly to resolve the issue of Bell's alleged monopoly power. The court's failure to do so constituted reversible error.

B. REGULATION AND MISUSE OF MONOPOLY POWER

Mere possession of monopoly power does not violate the antitrust laws. *Grinnell, supra,* 384 U.S. at 571, 86 S.Ct. at

1704; *Berkey supra,* 603 F.2d at 273. Thus, even if the jury should find that Bell possessed monopoly power, liability under Sherman Act section 2 exists only if the jury finds that Bell abused its monopoly power by acting "in an unreasonably exclusionary manner" relative to its competitors. *Byars* v. *Bluff City News Co.,* 609 F.2d 843, 853 (6th Cir. 1979). WTC's position is that Bell's refusal to interconnect constituted such an abuse. Bell responds that the fact of regulation is relevant to the jury's decision whether the refusal was reasonable. Accordingly, Bell also argues that the district court erred in failing to instruct the jury to consider the impact of regulation in assessing whether Bell's conduct constituted a misuse of monopoly power.

As a general rule, a company has the right to deal with whomever it chooses. *Associated Press* v. *United States,* 326 U.S. 1, 14-15, 65 S.Ct. 1416, 1422, 89 L.Ed. 2013 (1945). This right is limited when the company possesses a monopoly because the danger exists that it may use its monopoly position to decrease competition in other markets by refusing to deal with competitors. Accordingly, courts have held that in certain instances a monopolist's refusal to deal violates the antitrust laws. *See, e.g., Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684 (1927); *United States* v. *Terminal Railroad Association,* 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912); *Gamco, Inc.* v. *Providence Fruit & Produce Building, Inc.,* 194 F.2d 484 (1st Cir.), *cert. denied,* 344 U.S. 817, 73 S.Ct. 11, 97 L.Ed. 636 (1952).[12]

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[12] Refusals to deal by a monopolist have been analyzed under two somewhat different approaches. Note, *Refusals to Deal by Vertically Integrated Monopolists,* 87 Harv.L.Rev. 1720, 1732-51 (1974). The first approach focuses on the monopolists intent in refusing to deal. *See Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684 (1927). *See also United States* v. *Colgate & Co.,* 250 U.S. 300, 307, 39 S.Ct.

This court has considered competitor's claims challenging a monopolist's refusal to deal. In *Poster Exchange, Inc.* v. *National Screen Service Corp.*, 431 F.2d 334 (5th Cir. 1970), *cert. denied*, 401 U.S. 912, 91 S.Ct. 880, 27 L.Ed.2d 811 (1971), a vertically integrated producer-distributor of motion picture advertising accessories allegedly used its monopoly position in the production market to obtain a monopoly in the Atlanta distribution market by refusing to deal with local distributors. We affirmed the judgment against the monopolist since it was clear that it had "intentionally used" its monopoly power and that its refusal could not be "defended on the ground that it was only the exercise of legitimate business judgment." *Poster Exchange, supra*, 431 F.2d at 339. Similarly, in *Six Twenty-Nine Productions, Inc.* v. *Rollins Telecasting, Inc.*, 365 F.2d 478 (5th Cir. 1966), an advertising agency claimed that the only television station in town improperly refused to accept ads from the agency. The station defended its actions on the ground that the refusal to deal was based upon certain advertising standards created by the station for legitimate business reasons. The court reversed a grant of summary judgment in favor of the station and stated that "[i]t is

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465, 468, 63 L.Ed. 992 (1919). The second approach to the problem of a monopolist's refusal to deal is the so-called "bottleneck" theory. Under this approach, a monopolist who controls a "facility or resource that is essential to competitive viability in the marketplace must grant access to it on reasonable terms to [its] competitors." Watson & Brunner, *Monopolization by Regulated "Monopolies": The Search for Substantive Standards*, 22 Antitrust Bull. 559, 571 (1977). *See e.g., United States* v. *Terminal Railroad Association*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912) (group of railroad companies acquiring essential transportation facility and denying access to competitors); *Associated Press* v. *United States*, 326 U.S. 1, 14-15, 65 S.Ct. 1416, 1422, 89 L.Ed. 2013 (1945) (news agency's rules denying membership to competitors of existing members). While in theory there exist differences between the two approaches, in practice the theories are similar. *Byars* v. *Bluff City News Co.*, 609 F.2d 843, 856 (6th Cir. 1979).

clear that the complaint is sufficient if the refusal of defendant to accept advertising from plaintiff by setting up unreasonable standards or by adopting an arbitrary course of action is for the purpose of destroying plaintiff as an agency and thereby furthering a course toward monopolization." *Six Twenty-Nine, supra,* 365 F.2d at 483. The court recognized that the issue of the station's intent was the most important fact inquiry, and further acknowledged that the reasonableness of the advertising standards was "a key factor in determining whether the Station had the intention of eliminating the competition of the plaintiff agency." *Six Twenty-Nine supra,* 365 F.2d at 486.

As both *Poster Exchange* and *Six Twenty-Nine* make clear, a monopolist is not liable simply by refusing to deal, but may in appropriate situations present valid justifications for its actions. *See, e. g., United Brands, supra,* 532 F.2d at 239-40 (monopolist could not be held liable for closing its plant, and thereby refusing to deal with local railroad, since closing was justified by the fact that the plant was losing money); *Packaged Programs, Inc.* v. *Westinghouse Broadcasting Co.,* 255 F.2d 708 (3d Cir. 1958) (factual issue existed whether monopolist television station's refusal to accept competitor's film was based on valid business judgment); *Gamco, supra,* 194 F.2d at 487-88 (denial of access to commercial building would have been justified in certain situations). *See also E. A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Committee,* 467 F.2d 178 (5th Cir. 1972) (existence of objective business reasons justified concerted refusal to deal), *cert. denied,* 409 U.S. 1109, 93 S.Ct. 912, 34 L.Ed.2d 690 (1973); *Union Leader Corp.* v. *Newspapers of New England, Inc.,* 180 F.Supp. 125 (D.Mass.1959), *modified,* 284 F.2d 582 (1st Cir. 1960) (monopolist's conduct tested under "fairness" approach which includes consideration of industry practices), *cert. denied,* 365 U.S. 833, 81 S.Ct. 747,

6 L.Ed.2d 201 (1961). Thus, as a general principle, section 2 prohibits only those refusals to deal which under the particular circumstances of a case are unreasonably anti-competitive. *Byars, supra,* 609 F.2d at 860.[13]

Therefore, the question is whether this principle of anti-trust law permits consideration of regulation in assessing the reasonableness of Bell's actions.[14] It is undisputed that the district court instructed the jury that it may consider "legitimate telephone business reasons" for Bell's actions. Bell contends, however, that the failure to instruct the jury to consider regulatory reasons for its actions was error. Indeed, throughout the proceedings in this case Bell

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[13] Analysis of the factual context in which an action allegedly in violation of the antitrust laws occurred is also important under the "rule of reason" under section 1. *See, e.g., Board of Trade* v. *United States,* 246 U.S. 231, 238, 38 S.Ct. 242, 243, 62 L.Ed. 683 (1918); *Neeld* v. *National Hockey League,* 594 F.2d 1297 (9th Cir. 1979); *E. A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Commission,* 467 F.2d 178 (5th Cir. 1972), *cert. denied,* 409 U.S. 1109, 93 S.Ct. 912, 34 L.Ed.2d 690 (1973). Both Bell and WTC have expended considerable energies debating whether the "rule of reason" concept applies in section 2 cases. It is clear, however, that the analysis under section 2 is similar to that under section 1 regardless whether the rule of reason label is applied per se. *Byars* v. *Bluff City News Co.,* 609 F.2d 843, 860 (6th Cir. 1979).

[14] Unlike other parts of this opinion, this issue is not determined by *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973). In *Otter Tail,* there existed no positive justification for the monopolist's actions, and indeed, the company did not dispute that "its purpose in refusing to deal with municipalities desiring to establish municipally owned systems is to protect itself in the position it now enjoys in the area." *United States* v. *Otter Tail Power Co.,* 331 F.Supp. 54, 61 (D.Minn.1971). The company engaged in other predatory practices that went far beyond a mere refusal to deal including refusals to wheel power, use of restrictive clause in various contracts, and instigating a pattern of litigation to harass municipalities. Thus, *Otter Tail* did not present a case like the present one where the utility is arguing that its actions were justified by articulable public interest factors.

states that its primary justification for refusing interconnection with WTC was its belief that interconnection was contrary to the public interest as defined in section 201(a) because it would result in duplication of facilities in The Woodlands area. Bell contends that many of its statements and actions concerning its refusal to interconnect cannot be understood properly without consideration of the regulatory scheme.

We hold that the district court also erred in failing to instruct the jury that it could consider the effect of regulation in ascertaining whether Bell willfully misused its monopoly power. This holding is based on the structure and effect of section 201(a) under which the FCC, upon appropriate demand, is empowered to determine whether a particular interconnection is in the public interest. The FCC's inquiry is controlled by its consideration of the public interest as informed by the general concerns of the Communications Act and prior adjudicatory decisions under section 201(a). As previously noted, it is possible that in certain situations, interconnection will not be in the public interest. Thus the FCC has refused interconnection in several cases, e.g., *Oklahoma-Arkansas Telephone Co.* v. *Southwestern Bell Telephone Co.*, 6 FCC 809 (1939); *Western Union Telegraph Co.*, 17 FCC 152, 174-75 (1952). *See also In the Matter of AT&T*, 67 FCC 2d 1455, 1472-80 (1978), *rev'd on other grounds sub nom. MCI Telecommunications Corp.* v. *FCC*, 580 F.2d 590 (D.C.Cir.), *cert. denied*, 439 U.S. 980, 99 S.Ct. 566, 58 L.Ed.2d 651 (1978). In those instances, public policy will be vindicated only if interconnection is denied. Prevention can occur only if the private utility denies interconnection in the first instance. Where the private concern properly denies an interconnection, it would be contrary to public policy to permit antitrust liability against it.

In the present case, we do not know if the interconnection was, in fact, in the public interest since the opportunity for FCC determination of that question was foreclosed by the withdrawal of WTC's complaint. Nevertheless, it is the antitrust court's responsibility to judge the reasonableness of Bell's refusal in light of the relevant factual context of the decision which necessarily includes consideration of the effect of regulation. Bell's position is that the refusal was not arbitrary or motivated by anticompetitive intent, but instead was proper because Bell believed that WTC's request was contrary to the public interest.[15] If Bell was correct in its assessment, and if its purpose in refusing interconnection was to vindicate the public interest, then the refusal, despite its obvious anticompetitive effect, would have been proper and entitled to protection from antitrust scrutiny. In this case, where the public interest has not been officially determined, it is no less important for the vindication of the statutory procedure that under proper instruction the jury be allowed to consider why Bell's refusal to interconnect was reasonable under the antitrust laws because it was based on articulable concerns of regulatory policy. The important issue in this case is whether Bell's action was reasonable under antitrust law in light of the relevant factors concerning the public interest standard.

It is clear from the facts of this case that Bell's refusal may plausibly have been based on legitimate regulatory factors relevant to section 201(a). The difficulties presented by the construction of city-sized developments are many; indeed, commentators have speculated on a variety of constitutional problems presented by new communities.

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[15] In this regard we note the statement in plaintiff-appellee WTC's brief that "The issue of regulation was relevant for the jury only insofar as it reflected Bell's intent or motive in denying the interconnection." (WTC's brief pp. 51-52.)

See, e. g., Comment, *Democracy in the New Towns: The Limits of Private Government,* 36 U.Chi.L.Rev. 379 (1969). The problems raised in this case, while less theoretical, are no less significant. The Woodlands was planned as a fully integrated city developed in the midst of an existing, albeit undeveloped, portion of the metropolitan area. Prior to the emergence of The Woodlands plan, other entities had been planning for the area along more traditional lines. One such entity was Bell which had been serving developed areas within its Spring and Pinehurst exchanges for several decades, and planning for the undeveloped areas which included most of The Woodlands site. Thus, The Woodlands concept, while innovative, did not occur on land unaffected by previous planning. Both Bell and WTC had legitimate expectations regarding the area. Bell's argument that it was seeking to determine the public interest is therefore not facially implausible. Concern with duplication of service and facilities resulting in inefficient service presents a possible ground for a legitimate refusal to interconnect. We do not determine here that Bell's refusal was, in fact, reasonable, but we hold that factual issues concerning the reasonableness of Bell's actions are presented which require resolution by a jury properly instructed by the trial judge as to the relevant regulatory framework. "Failure to do so would produce misconceptions that go to the heart of the doctrine itself." *Marine Bancorporation, supra,* 418 U.S. at 627, 94 S.Ct. at 2873.[16]

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[16] Even granting that the district court erred in failing to instruct on the nature of regulation, WTC contends that the omission was harmless error. We reject that argument. The question on appeal is not whether an instruction was faultless in every respect, but whether the jury, considering the instruction as a whole, was misled. *Coughlin* v. *Capitol Cement Co.,* 571 F.2d 290, 300 (5th Cir. 1978); *International Air Industries, Inc.* v. *American Excelsior Co.,* 517 F.2d 714, 728 (5th Cir. 1975), *cert. denied,* 424 U.S. 943, 96 S.Ct. 1411, 47 L.Ed.2d 349 (1976). Thus, only in those cases where the reviewing court has a substantial doubt whether the

V. DAMAGES

Since this case is being remanded for a new trial we need not consider all the parties' contentions with respect to the damage phase of the lawsuit, but we discuss certain points which should be considered on retrial.

In response to the special interrogatories, the jury found that the amount which would fairly and reasonably compensate WTC for injury to its business or property caused by Bell was the sum of $18,369,827. This was the exact amount which plaintiff WTC sought in the case and which its expert Pat Loconto, of Touche Ross & Company testified were its lost profits. (PX 261.) Examination of exhibit 261 discloses that WTC's total net profit before deduction for federal income taxes for the 27-year period selected by it amounted to $70,308,996. This sum discounted to present value totaled $18,369,827.

The ultimate treble damage award of $55,109,481 is striking in view of the circumstances. WTC was a newly founded company with no record of sales or profits, and was organized to provide independent telephone services

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jury was fairly guided in its deliberations should the judgment be disturbed. *McCullough* v. *Beech Aircraft Corp.*, 587 F.2d 754, 759 (5th Cir. 1979). WTC argues that the failure to instruct on the nature of regulation was harmless because Bell presented evidence on regulation during trial and discussed the effect of regulation during its closing argument. Moreover, WTC asserts that the district court's instruction that liability could not be found if the jury believed that Bell "refused to interconnect for legitimate telephone business reasons," was sufficiently broad to include consideration of regulation. We disagree.

The failure to instruct on the impact of regulation is too central to be harmless error. Bell's presentation of evidence on regulation and discussion during closing argument cannot in and of itself justify the district court's failure to provide guidance on the issue for without specific instruction the jury has no indication how such evidence was to be used in its deliberations. To hold otherwise would be to abrogate the district court's duty to instruct the jury accurately.

in an area not yet built. It was formed with an initial capital of $251,000. Mitchell and Mid-Texas each put up $500, a total of $1,000, to purchase the capital stock of the newly formed WTC. Mid-Texas then purchased $250,000 of preferred stock. Of the total initial capital only $120,000 in unrecoverable funds was spent by WTC. However, Mitchell would be entitled to one half of the $55 million judgment for damages in this case on an investment of $500.

It was error for the district judge to instruct the jury that in considering plaintiff's damage model, "you may assume" that WTC had proved it would enjoy a monopoly and be the only telephone company in The Woodlands for the 27-year period of time selected in assessing future damages. The district court's instruction to the jury in that regard reads as follows:

> In determining WTC's lost profits, you may assume that WTC's and Southwestern Bell's roles would have been reversed, so that WTC, instead of Southwestern Bell, would have been and would continue to be the only company providing telephone service to that portion of The Woodlands that has been and will be in the future served by Southwestern Bell.

R. at 631. Whether it might be "assumed" that WTC would be the only company serving The Woodlands was a strongly disputed fact according to the evidence presented by the parties. Bell maintained throughout the most of The Woodlands area was situated in its Spring and Pinehurst exchanges, that its published tariffs to that effect were disclosed before the concept of The Woodlands was announced. Further, Bell showed that it intended to serve The Woodlands area and already was providing service to 2,000 subscribers immediately around The Woodlands site when the interconnection controversy developed. While it

is true that WTC sought a monopoly in The Woodlands without competition, it is far from certain that its proof showed that it could have accomplished this objective. In instructing the jury that "you may assume" that WTC would be the only telephone company in The Woodlands the district court did not give due consideration to the evidence of record and its instruction was erroneous.[17]

In addition, WTC's damage model arbitrarily selected a 27-year period to develop future profits.[18] It was based on an erroneous concept of future damages. The total net profits reflected in the model showed no deduction for federal income taxes.[19] Significantly, at least 25% of the conjectured future profits of WTC are shown to have occurred in the last four years of the 27-year period. (See PX 261.) On retrial, these errors can be avoided by proper instruction to the jury on the issue of the respective, competitive rights of WTC and Bell to serve The Woodlands and on the propriety of the submission of a credible damage model.

REVERSED AND REMANDED FOR A NEW TRIAL.

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[17] The charge was obviously ambiguous and confusing as the chambers conference colloquy between the court and counsel reveals. Though requested by Bell's counsel to do so, the district judge declined to delete the charge in what was a critically important portion of his instructions. It is even possible under the language of the charge that the jury may have believed that it was being told to assume the WTC monopoly. (See Tr. 3484-3488.)

[18] The transcript discloses that the expert witness chose the cutoff year of 1999 – a 27-year period – at the direction of plaintiff's counsel. Tr. 2325-2327.

[19] Though plaintiff's exhibit 261 shows net profits *before* federal income taxes and is the predicate for the jury's $18 million verdict, plaintiff's exhibit 265 discloses by years on the bottom line Net Income (Loss) *after* deduction for federal income taxes. Obviously a net profits total after income taxes would be substantially lower than that shown in exhibit 261. Cf. *Norfolk & Western Ry. Co.* v. *Liepelt*, .. U.S. .., 100 S.Ct. 755, 62 L.Ed.2d 689 (1980) for the Supreme Court's most recent pronouncement on the propriety of considering income taxes in damage awards.

WOODLANDS TELECOMMUNICATIONS CORPORATION,
Plaintiff,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND SOUTHWESTERN BELL TELEPHONE COMPANY,
Defendants.

CIV. A. No. 73-H-1577.

UNITED STATES DISTRICT COURT,
S. D. TEXAS,
HOUSTON DIVISION.

MARCH 9, 1978.

George D. Byfield, McGinnis, Lochridge & Kilgore, Austin, Tex., for plaintiff.

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James M. Shatto, Houston, Tex., of counsel, for defendants.

MEMORANDUM OPINION AND ORDER

SINGLETON, District Judge.

Woodlands Telecommunications Corporation (WTC) filed this suit charging that defendants Southwestern Bell Telephone Company (Southwestern Bell) and American Telephone and Telegraph Company (AT&T) combined and conspired to monopolize the telephone business at a new community development north of Houston, Texas, known as the Woodlands, in violation of sections 1 and 2 of the Sher-

man Act, 15 U.S.C. §§ 1, 2. Defendants have filed a motion to dismiss for failure to state a claim upon which relief can be granted. Defendants contend that this case should be dismissed for two reasons: (1) their conduct is immune from the antitrust laws because of regulation by the Federal Communications Commission (FCC) under the authority granted by the Communications Act of 1934, 47 U.S.C. § 151, *et seq.;* and (2) under the doctrine of primary jurisdiction, the FCC is the proper forum to decide the issues involved. The court concludes that under the facts as alleged in the first amended complaint, defendants are not immune from the antitrust laws and the doctrine of primary jurisdiction is not applicable. Accordingly, the motion to dismiss is denied.

In considering a motion to dismiss for failure to state a claim, the allegations of the complaint are accepted as true. *Mann* v. *Adams Realty Company, Inc.,* 556 F.2d 288 (5th Cir. 1977). For the purposes of this motion, the facts which are recited and accepted as true are those alleged in plaintiff's first amended complaint.

FACTS ALLEGED

In 1971-72, Mitchell Energy and Development Corporation (Mitchell) planned a new community development to be located north of Houston, which was to be known as Woodlands. Mitchell acquired 18,000 acres of previously uninhabited land for this community. The project was to be developed by a Mitchell subsidiary, Woodlands Development Corporation (Woodlands Development). It was envisioned this new community to reach a population of 150,000 over a twenty-year period.

There was no existing telephone service for this area; however, Southwestern Bell had announced that it would provide service to this area. Mitchell and Woodland Development met with representatives of several companies,

including Southwestern Bell, which had expressed an interest in providing telephone service to the new development. The developers eventually chose the proposal made by Mid-Texas Communications Systems, Inc. (Mid-Texas) for telephone service for the Woodlands. Mid-Texas operates telephone companies in several towns in Central Texas and around Houston, Dallas, and San Antonio. Mid-Texas proposed that Mitchell and Mid-Texas form a new corporation, WTC, which, with Mid-Texas' funding and operational expertise, would provide telephone service to the Woodlands. Mid-Texas and Mitchell each owned 50 percent of the stock of WTC.

AT&T, along with Southwestern Bell and other AT&T subsidiaries, are frequently referred to as the Bell System. Each of the operating companies is an independently organized corporation providing local telephone service in one or more states. AT&T itself does not provide local telephone service, but, through its Long Lines Department, furnishes interstate telephone service to its operating companies. Each operating company connects with the facilities of other telephone companies, including non-Bell System companies and the Long Lines Department of AT&T to provide long-distance telephone service.

The Bell System assigns NNX codes for each area of the United States. The NNX code is the first three digits of all telephone numbers. In order for any telephone company to begin service, there must be an NNX code assignment for its service area and its facilities must be interconnected to those of the Bell System.

The first amended complaint alleges that AT&T and Southwestern Bell wanted the telephone business at the Woodlands and wanted to prevent a competitor, namely WTC and Mid-Texas, from having that business. After

learning that the developers had chosen the Mid-Texas proposal, AT&T and Southwestern Bell engaged in a course of conduct designed to prevent WTC and Mid-Texas from providing telephone service to the Woodlands. Southwestern Bell, therefore, refused to assign an NNX code for the Woodlands area and refused to interconnect with WTC.

There was no state agency in the state of Texas at this time which regulated telephone operations so by refusing to assign NNX codes and by refusing to interconnect, Southwestern Bell could exclude any other telephone companies it chose from competing with it. However, a telephone company could file a complaint with the FCC under 47 U.S.C. § 201(a)[1] and the FCC could compel interconnection by Southwestern Bell. Such interconnection would be with respect to interstate lines only. With respect to intrastate interconnection, a telephone company would have to bring an action in the Texas state courts to require interconnection.

To thwart these efforts by WTC, the complaint alleges that AT&T and Southwestern Bell determined that delaying any interconnection orders could effectively prevent WTC from providing the necessary telephone service for the Woodlands. Because of its loan commitments, the developer of the Woodlands could not allow for a delay in telephone service. If WTC was delayed in providing telephone serv-

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[1] § 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

ice, the Woodlands would have no alternative but to turn to Southwestern Bell for service. It is alleged that Southwestern Bell was successful in delaying action by the FCC by using bad faith procedural maneuvers.

Southwestern Bell also prevented attempts by WTC to provide temporary interconnection. WTC attempted to provide temporary telephone service through interconnection with telephone companies other than Southwestern Bell. Southwestern Bell prevented such interconnection, through economic coercion exerted on the other telephone companies.

After all efforts for temporary service were exhausted and action by the FCC had been delayed so that any WTC telephone service could not keep pace with the Woodlands' development schedule, WTC and Mitchell conceded that Southwestern Bell had been successful in preventing anyone other than a Bell System company from providing telephone service to the Woodlands. Accordingly, Mitchell contacted Southwestern Bell to see if it would provide the necessary telephone service. Southwestern Bell agreed to provide such service on the condition that the complaint that had been filed by WTC with the FCC be withdrawn. Because of this ultimatum, the complaint was withdrawn. Southwestern Bell is now providing telephone service to the Woodlands.

ANTITRUST IMMUNITY

The first question which must be addressed is whether the FCC's jurisdiction over the telephone companies under the Communications Act has preempted this court's jurisdiction under the antitrust laws to decide the instant case. The Communications Act does not expressly exempt the telephone companies from the antitrust laws so the issue is whether the Act provides implied immunity. Whether a regulatory scheme implicitly immunizes regulated activities and organizations from the anti-trust laws depends upon

the nature of the particular agency and statutes in question. Cases dealing with other agencies and statutes cannot be controlling in this case, but are helpful in determining what questions are relevant. It is necessary to analyze the scope and history of the regulatory scheme to determine whether the particular anti-trust challenge alleged here can be reconciled with the regulatory scheme.

This analysis involves two distinct inquiries. First, it may be asked whether, by enacting a particular statute governing specific conduct, Congress intended that conduct to be controlled solely by the regulatory agency. This was the inquiry in *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975), where the Supreme Court found that under section 19(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78s(b), Congress intended to leave the supervision of the fixing of reasonable rates of commission to the Securities and Exchange Commission. The court held that the antitrust laws were inapplicable since they would bar fixed commission rates which would preclude and prevent the operation of the Securities Exchange Act as intended by Congress.

If Congress intends conduct to be controlled solely by a regulatory agency, there is an irreconcilable conflict between the regulatory statute and the antitrust laws. Defendants argue that such a conflict exists by reason of section 201(a) of the Communications Act, 47 U.S.C. § 201(a). Under section 201(a), the FCC has the authority to order a carrier to interconnect only after the FCC has determined that the interconnection is necessary or desirable in the public interest. Defendants contend that the antitrust laws cannot apply in this instance because it would usurp the FCC's jurisdiction to determine whether interconnection is in the public interest.

Defendants misinterpret section 201(a). A determination of public interest by the FCC is not necessary before carriers interconnect their facilities. As opposed to a licensing statute, section 201(a) leaves the question of whether to interconnect to be decided in the normal course of business by the parties; carriers may interconnect their facilities without FCC permission or order. A public interest determination by the FCC is required only if a carrier has refused to interconnect and such refusal is challenged before the FCC.

A carrier's decision whether to interconnect or refuse to interconnect is a matter of business judgment which is not subject to section 201(a) unless, after a refusal, the FCC directs such interconnection. Therefore, the decision whether to voluntarily interconnect is itself not subject to regulatory supervision. When relationships in business are not governed by regulatory supervision, but are rather the product of the business judgments of the parties, the courts should be hesitant to conclude that the antitrust laws are inapplicable. *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 374, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973); *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963); *United States* v. *Radio Corp. of America,* 358 U.S. 334, 351, 79 S.Ct. 457, 3 L.Ed.2d 354 (1959). Where a carrier refuses to interconnect and there has been no FCC action on the matter, the maintenance of an antitrust action does not interfere with FCC regulation. Where the FCC has acted, however, and directed a carrier to interconnect, the antitrust laws should not be used to interfere with the FCC's determination.

At common law, there was no duty to interconnect facilities between carriers. Section 201(a) was enacted in recognition of this fact. *Oklahoma-Arkansas Telephone Co.* v. *Southwestern Bell Telephone Co.,* 45 F.2d 995 (8th Cir.

1930), *cert. denied,* 283 U.S. 822, 51 S.Ct. 346, 75 L.Ed. 1437 (1931). If the refusal to interconnect is for the express purpose of excluding competition, as is alleged in this case, the antitrust laws may provide another remedy in addition to section 201(a). Whether the court is asked to order interconnection or to award treble damages, the practical effect is that the court must determine whether there should be or should have been an interconnection between the carriers. Under most circumstances, a court may consider certifying the question of whether the interconnection is in the public interest to the FCC under the doctrine of primary jurisdiction. However, under the doctrine of primary jurisdiction, as will be discussed below, the court would not lose jurisdiction and the case would not be dismissed. Rather, the final determination of the antitrust question would merely be postponed.

A second distinct inquiry is whether the regulatory scheme in its entirety is so pervasive that it necessarily displaces the antitrust laws. In *United States* v. *National Association of Securities Dealers,* 422 U.S. 694, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975), the Supreme Court, using this analysis, held that the Securities and Exchange Commission's exercise of regulatory authority under the Investment Company Act of 1940, 15 U.S.C. § 80a–1, *et seq.*, and the Maloney Act, 15 U.S.C. § 78o–3, was sufficiently pervasive to confer implied immunity from the antitrust law.

Repeals of the antitrust laws by implication "are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *Gordon* v. *New York Stock Exchange,* 422 U.S. at 682, 95 S.Ct. 2598; *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 350–351, 83 S.Ct. 1715, 1734, 10 L.Ed.2d 915 (1963). Immunity will be implied only if necessary to make the regulatory statutes work, and "only to the mini-

mum extent necessary." *Gordon* v. *New York Stock Exchange,* 422 U.S. at 683, 95 S.Ct. at 2612.

The argument that the Communications Act is so pervasive with respect to the telephone industry that it impliedly repealed or displaced the antitrust laws was rejected in *United States* v. *American Telephone & Telegraph Co.,* 427 F.Supp. 57 (1976), *cert. denied,* No. 77-1009 (D.C.Cir. May 26, 1977), *cert. denied,* 434 U.S. 966, 98 S.Ct. 507, 54 L.Ed.2d 452 (1977). This court agrees with the conclusion of Judge Waddy that "[n]either the language, nor the legislative history of the Communications Act supports the conclusion that Congress intended by the Act to grant a total, blanket immunity to defendants from application of antitrust laws, and to place exclusive jurisdiction over all their conduct in the Federal Communication Commission." *United States* v. *American Telephone & Telegraph Co.,* 427 F.Supp. at 61.

PRIMARY JURISDICTION

The doctrine of primary jurisdiction applies when a court and a regulatory agency have concurrent jurisdiction over all or part of a controversy and determines whether the court or the agency should make the initial decision. The doctrine does not allocate power between courts and agencies, but governs only whether the court or agency will initially decide the particular issue. A determination that an agency has primary jurisdiction does not necessarily mean that the court will refrain from deciding the case; the court's jurisdiction is not ousted by primary jurisdiction, but is only postponed. *United States* v. *Philadelphia National Bank,* 374 U.S. at 353, 83 S.Ct. 1715, 10 L.Ed.2d 915; 3 K. Davis, Administrative Law Treatise § 19.01 at 3 (1958). Accordingly, a determination to invoke the doctrine of primary jurisdiction will not result in

dismissal of a case but will only involve a staying of further action until the questions certified to the administrative agency have been resolved.

A case involving interconnection between carriers will frequently give rise to the question of whether such interconnection will be in the public interest. Congress, through section 201(a), has indicated that the FCC should determine this question. Therefore, in most antitrust cases based on one carrier's refusal to interconnect with another, the question of whether such interconnection would be in the public interest should be referred to the FCC for initial determination. Following resolution of this question, the court would then determine the antitrust issues.

If plaintiff was seeking an order from this court compelling defendants to interconnect, the case would definitely call for referral to the FCC. In most instances, the seeking of treble damages rather than injunctive relief would not alter the referral to the FCC since the threat of treble damages as a practical matter may achieve the same result as injunctive relief. However, for two reasons, referral of this case to the FCC under the doctrine of primary jurisdiction would be improper.

First, when Southwestern Bell was contacted by Mitchell to provide telephone service to the Woodlands and began providing such service, the question of whether interconnection was in the public interest became moot. Once Southwestern Bell began providing telephone service to this area, there was no other carrier with which defendants could interconnect. The question of whether interconnection was in the public interest was moot before this antitrust suit was filed. Further, there could be no regulatory policy which could be served by this court requesting the FCC to attempt to decide issue where no current controversy exists.

Secondly, the question of whether defendants should be ordered to interconnect with plaintiff's facilities was before the FCC, and therefore the question of whether interconnection was in the public interest was also before the FCC. The complaint alleges, and for the purposes of this motion such allegation is accepted as true, that the defendants, acting in bad faith, prevented the FCC from determining these issues. The conduct which is alleged to have violated the antitrust laws includes defendants' actions in preventing plaintiff's access to the administrative remedies of the FCC. Because the refusal to interconnect forms only a portion of the antitrust violations complained of herein, referral of the interconnection issue to the FCC is not required.

Defendants, citing *Noerr*,[2] *Pennington*,[3] and *California Motor Transport*,[4] assert that their resort to the FCC in opposing plaintiff's complaint under section 201(a) cannot violate the antitrust laws even if their motive for so doing was anticompetitive. While resort to governmental processes does not violate the antitrust laws, attempts to bar one's competitor's meaningful access to administrative agencies or the courts is not immune from antitrust legislation. *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 511-12, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). The complaint here alleges bad faith abuse of the administrative process so defendants do not have protection under the *Noerr-Pennington* doctrines.

Therefore, premises considered, it is ORDERED that defendants' motion to dismiss be, and the same is hereby, DENIED.

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[2] *Eastern R. R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961).

[3] *United Mine Workers* v. *Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965).

[4] *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972).

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 79-1221

D. C. DOCKET No. CA 73-H-1577

MID-TEXAS COMMUNICATION SYSTEMS, INC., ET AL,
Plaintiffs-Appellees,

v.

AMERICAN TELEPHONE AND TELEGRAPH CO., ET AL,
Defendants,

SOUTHWESTERN BELL TELEPHONE COMPANY
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

Before AINSWORTH, INGRAHAM and GARZA, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded for a new trial to the said District Court in accordance with the opinion of this Court;

It is further ordered that plaintiffs-appellees pay to the defendant-appellant the costs on appeal, to be taxed by the Clerk of this Court.

May 1, 1980

Issued as Mandate: June 9, 1980

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK
May 27, 1980

GILBERT F. GANUCHEAU
Clerk
TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

TO ALL PARTIES LISTED BELOW:

No. 79-1221

MID-TEXAS COMMUNICATION SYSTEMS, INC., ET AL
VS–
AMERICAN TELEPHONE AND TELEGRAPH CO., ET AL
SOUTHWESTERN BELL TELEPHONE COMPANY

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appelate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appelate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By R. ADELINE BARNES
Deputy Clerk

Mr. Walter E. Workman
Mr. George L. Saunders, Jr.
Mr. George D. Byfield

Supreme Court, U. S.
FILED
SEP 5 1980
MICHAEL RODAK, JR., CLERK

No. 80-175

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

WOODLANDS TELECOMMUNICATIONS CORPORATION,

Petitioner,

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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September 5, 1980

QUESTIONS RESTATED

1. Should the petition be granted to review the Court of Appeals' holding that the existence of FCC power to compel interconnection to the toll network is relevant to the question whether Bell has monopoly power?

2. Should the petition be granted to review the Court of Appeals' holding that the regulatory policies embodied in Section 201(a) of the Communications Act are relevant to the question whether a refusal to interconnect voluntarily is a misuse of monopoly power?

3. Should the petition be granted to review the Court of Appeals' *sua sponte* footnote reference to the effect of federal income taxation on antitrust recoveries?

4. Should the petition be granted, in any case, when the case has been remanded because of errors not only with respect to liability but also as to damages, primarily on grounds *not* presented for review by the petition, and when retrial will be necessary in any event?

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No. 80-175

IN THE

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OCTOBER TERM, 1979

WOODLANDS TELECOMMUNICATIONS CORPORATION,

Petitioner,

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner, Woodlands Telecommunications Corporation ("WTC"), seeks review of a decision of the United States Court of Appeals for the Fifth Circuit which reversed an antitrust judgment against respondent and remanded the case for a new trial. Although the Court of Appeals' opinion accurately summarizes the facts, *see* Appendix at A-2 - A-4, A-32 - A-33, a brief statement is necessary to correct serious misstatements contained in the petition.

This case arises from a controversy concerning the provision of telephone service in the "Woodlands", a community being developed near Houston, Texas. Respondent, Southwestern Bell ("Bell"), has provided telephone service in this part of Texas for several decades, in accordance with duly published tariffs (Tr. 546-47, 3058-59), and the major portion of the Woodlands development is within Bell's Spring exchange. (Appendix at A-33; Tr. 1765).

Because Bell is a common carrier with an obligation to provide service upon request, it has always monitored population growth and development trends in order to plan and construct facilities necessary to satisfy growing demand. Having forecast future development in the area that includes the Woodlands site, Bell had committed itself to construct new facilities in its Spring exchange even before it learned of the Woodlands development. (Tr. 2065-66, 3281-85).

After the Woodlands development plans were announced, Bell advised the developer, Mitchell Energy & Development Company ("Mitchell"), that Bell was prepared to serve that portion of the Woodlands that was within its tariffed exchange areas. (Tr. 831-33). Subsequently, however, Mitchell approached Bell to determine whether it would make payments to the development in exchange for "permission" to provide service. (Tr. 859, 1172-73). Bell refused because to make such payments would have been inconsistent with its obligations as a regulated common carrier and company policy. (Tr. 861, 867-68, 896-97). Mitchell then entered into an agreement with Mid-Texas Communications Systems, Inc. ("Mid-Texas") to form petitioner, WTC, to provide telephone service within the Woodlands, irrespective of existing tariff and exchange areas. (Tr. 1777; DX 92, 284).

Because WTC needed access to Bell's toll facilities in order to provide long distance service to future subscribers, it proceeded to request toll connections. (Tr. 625-26, 628). Although Bell declined voluntarily to interconnect with WTC, it advised WTC that the Federal Communications Commission ("FCC") had the power to order interconnections if it were found to be in the public interest and that Bell would obey any interconnection order of either federal or state authorities. (DX 119; Tr. 759). The reason Bell took these actions was that its established tariffs required it to provide service within the area, and it had already made a substantial investment in planning and constructing facilities needed to meet the growth of demand in the area. It thus believed that

wasteful duplication of facilities and service would inevitably result from a second local telephone company, and its concern was that interconnection would be contrary to the public interest and to the interest of all telephone subscribers in the area. *Ibid*; *see* Appendix at A-32 - A-33.

The *only* way that these substantial public interest issues could be appropriately considered was for Bell to deny interconnection and allow the matter to be submitted to the appropriate authorities for determination. *See* Appendix at A-31.

On November 9, 1972, WTC filed an informal complaint with the FCC seeking the interstate toll connections that it had requested. (DX 285; Tr. 1647, 2984). This complaint, however, was withdrawn on August 3, 1973 after a vote of the directors of WTC. (DX 204; Tr. 1848-52). While the Petition asserts (p. 6) that "economic coercion" from Bell caused it to withdraw the complaint, this assertion ignores the undisputed facts. The minutes of the WTC's directors meetings indicate that the directors had been concerned that unless the complaint were withdrawn, there was a substantial risk that the FCC might deny WTC's petition and WTC therefore "would lose any chance it might have to sue Bell at a later date." (DX 201). The directors further recognized that even if the FCC were to order interconnection, WTC would have to compete with Bell for subscribers within the development. (Tr. 1735-37; DX 201).[1]

After the complaint was withdrawn before the FCC, WTC filed this suit claiming that Bell's refusal voluntarily to interconnect constituted monopolization in violation of §2 of the Sherman

[1]The sole evidence offered in support of WTC's claim of coercion consisted of 13 acts relating to the day to day relationship of Bell to Mid-Texas, one of WTC's promoters. (Tr. 997-99). However, nearly all the items on this list arose before Mid-Texas became involved in WTC (Tr. 3199), and Mid-Texas did not regard any of the items as having any bearing upon the interconnection dispute until long after this case was filed. (Tr. 3188).

Act. Following a jury verdict, the district court entered judgment against Bell of $55 million. On appeal, the Court of Appeals rejected respondent's claim that all of its conduct was immune from antitrust liability. *See* Appendix at A-6 - A-21. However, it reversed the judgment and remanded for a new trial as to both liability and damages. On liability, it held the trial court had erred in (1) holding that Bell's direct dealings with the FCC could be a basis for liability under the *Noerr-Pennington* doctrine,[2] *id.*, A-21, (2) refusing to instruct the jury that the FCC's power to order interconnection was relevant to the existence of monopoly power, *id.*, A-24 - A-26, and (3) refusing explicitly to instruct the jury concerning the regulatory framework as it pertained to misuse of monopoly power. *Id.*, A-26 - A-33. As to damages, the Court of Appeals further held that it was error to instruct the jury to assume petitioner would have had a monopoly if it had been allowed to interconnect and criticized petitioner's damages evidence in several respects. *Id.*, A-34 - A-36.

The petition seeks review only of some of the issues upon which the Court of Appeals based its decision on liability and damages.

REASONS FOR DENYING THE PETITION

The questions presented in the petition neither possess national importance nor otherwise are appropriate for review by this Court. The Court of Appeals' holdings concerning the standards for determining monopolization apply well settled principles to the specific facts of this case. They do not conflict with the decisions of any other court of appeals or with any applicable decision of this Court. Indeed, it is only by misstating the Court of Appeals' holdings that petitioner is able to argue that the Court of Appeals departed from the very principles petitioner purports to

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[2] *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

accept. And the issue relating to the effect of income taxes on antitrust damages is not before this Court, for the Court of Appeals did not decide it, but merely identified the issue for consideration by the district court on the remand which was required on damages in any event.

Furthermore, because petitioner has not challenged the Court of Appeals' holdings that the trial court misapplied the *Noerr-Pennington* doctrine (Appendix at A-21) and that the damage determination was infected with several fundamental errors (in addition to the one purportedly raised) (Appendix at A-34 - A-36), the petition is in the nature of an interlocutory appeal. The case will be retried on both liability and damages regardless of the disposition made of this petition, and this underscores the inappropriateness of review of the issues petitioner raises. Indeed, Bell is the party primarily aggrieved by the decision because it must undergo a retrial *despite* its claim that its conduct is impliedly immune from antitrust liability. Bell has not cross-petitioned because the decision below is not a final disposition of the case and because the record is deficient for review of the immunity issue due to the evidentiary rulings of the trial court.

I. The Court Of Appeals Correctly Applied Established Criteria In Holding The Jury Had Been Erroneously Instructed Concerning The Elements of Monopolization.

Section 201(a) of the Communications Act, 47 U.S.C. §201(a), authorized the FCC to order Bell to interconnect with WTC if such interconnection was found to be in the "public interest." The district court held this provision did not immunize Bell from antitrust liability for refusal to interconnect voluntarily. It further held that, in the absence of immunity, §201(a) was absolutely irrelevant to the disposition of the case under the Sherman Act, and it refused to instruct the jury concerning the relevance of §201(a) to the questions of the existence of monopoly power and of misuse of monopoly power. The Court of Appeals held that this

was error. In so holding, the Court recognized the very point that the petition (p. 19) acknowledges—regulation is relevant "from a factual perspective" in applying the antitrust laws. *See Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963); *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602 (1974); Appendix at A-22.

A. Monopoly Power

The district court instructed the jury that Bell had monopoly power in the relevant market of providing telephone service in the Woodlands in that it "controlled" the long-distance facilities to which competitors must have access. The court refused to give Bell's proposed instruction that it must find that Bell had the power to exclude competition *despite* the FCC's authority under §201(a) of the Communications Act, 47 U.S.C. §201(a), to order interconnection. *See* Appendix at A-24 - A-25. The Court of Appeals held this was error because the fact that the FCC could compel Bell to provide interconnections was of undoubted relevance to whether Bell had the power to exclude WTC's entry. *Id.*, at A-26. This holding is simply a proper application of established antitrust principles.

Monopoly power exists only if a firm has the power "to control price or exclude entry," and whether a firm possesses such power is a question of fact to be determined in light of the characteristics of the industry. *See United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966). That the FCC had the authority to order Bell to provide interconnections to the toll network is "a fact of market life" that is of undoubted relevance to a determination whether Bell had the power to exclude entry. *See International Tel. & Tel. Co.* v. *General Tel. & Elec. Corp.*, 518 F.2d 913, 935-36 (9th Cir. 1975). Indeed, this Court has held that such "unique federal and state regulatory restraints" must be considered in applying antitrust laws to regulated firms that do not possess immunity. *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 627 (1974); *see Silver* v. *New York Stock Exchange*, 373

U.S. 341, 360-61 (1963). And the lower courts have uniformly held that regulatory provisions affecting a firm's ability to control price or exclude entry must be taken into account in determining if a defendant possesses monopoly power as a matter of fact.[3]

Petitioner misstates the Court of Appeals' holding when it asserts that the jury is required to decide the *legal* effect of §201(a). The jury's task on remand is to assess all the evidence in the record, including the existence of regulation, to determine whether Bell had the power to exclude entry as a matter of fact. It is not to determine whether §201(a) confers antitrust immunity. For this reason, *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), and *Mt. Hood Stages, Inc.* v. *Greyhound Corp.*, 555 F.2d 687 (9th Cir. 1977), are irrelevant. These decisions involved only the *legal* question of whether Congress intended to immunize a particular industry from the antitrust laws, not the factual question of whether the structure and operation of the regulatory scheme was such that an individual firm had the power to exclude entry in a particular factual context.

B. Misuse of Monopoly Power

Bell's position at trial was that even if it possessed monopoly power, its refusal to interconnect with petitioner was not motivated by anticompetitive intent because it believed petitioner's request would produce wasteful duplication of service and facilities and would be inconsistent with §201(a). *See* Appendix at A-32 - A-33. The district court instructed the jury that Bell could

[3] *See, e.g., International Railways of Central America* v. *United Brands Co.*, 532 F.2d 231, 240 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976); *Travelers Ins. Co.* v. *Blue Cross of Western Pa.*, 361 F. Supp. 774, 780 (W.D. Pa. 1972), *aff'd*, 481 F.2d 80 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973); *Redwing Carriers, Inc.* v. *McKenzie Tank Lines, Inc.*, 443 F. Supp. 639, 641 (N.D. Fla. 1977), *aff'd*, 594 F.2d 114 (5th Cir. 1979); *Nankin Hospital* v. *Michigan Hosp. Service*, 361 F. Supp. 1199, 1209 (E.D. Mich. 1973). *See also* Watson & Brunner, *Monopolization by Regulated "Monopolies": The Search for Substantive Standards*, 22 Antitrust Bull. 559, 565-75 (1977).

be found liable if its refusal was based on an anticompetitive purpose or intent, but it refused to instruct the jury that it could consider the nature of the regulatory framework in ascertaining whether Bell willfully misused monopoly power. The Court of Appeals held that the failure to give the latter instruction was reversible error because the jury needed to understand the regulatory context in which Bell had acted in order to determine whether it had acted with an anticompetitive purpose, rejecting petitioner's assertion that the omission was "harmless error." *Id.*, at A-33 - A-34 n. 16.

Petitioner claims (pp. 13-14) that in so holding the Court of Appeals "abandoned the anticompetitive purpose or intent standard"—which it maintains is compelled by the decisions of this Court—and adopted instead an "unreasonableness" test under which reasonable attempts to comply with regulatory policy do not give rise to antitrust liability. This is a misstatement of the Court's holding. The Court of Appeals did *not* hold it was reversible error to give the anticompetitive purpose instruction.[4] The holding was only that the reasonableness of Bell's conduct under regulatory principles was relevant in determining whether it had anticompetitive intent, and the jury should thus be explicitly instructed as to the regulatory framework.[5]

To the extent petitioner is contending that consideration of regulatory policies is somehow inappropriate to antitrust determinations, the claim is contradicted by its own admission that the

[4]Indeed the Court of Appeals expressed the opinion that, for practical purposes, there are no significant differences between the two allegedly different tests. *See* Appendix at A-27 - A-28 n. 12.

[5]Accordingly, there is no substance to petitioner's claim (pp. 18-20) that the decision below somehow conflicts with *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978) and with *International Tel. & Tel. Co.* v. *General Tel. & Elec. Corp*, 518 F.2d 913 (9th Cir. 1975). The Court of Appeals applied the "frame of reference" of the antitrust laws and held that under the very standards petitioner purports to accept, the regulatory framework was a relevant "fact of market life."

issue of regulation is relevant to Bell's intent. *See* Appendix at A-32 n.15. More importantly, it is flatly contrary to *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), in which this Court rejected the claim that the regulatory scheme under the securities laws displaced the antitrust laws but went on to prescribe that in applying the antitrust laws to such regulated industries "(t)he proper approach is then to adopt an analysis which reconciles the operations of both statutory schemes with one another," *id.*, at 357, and permits the regulated firm "sufficient breathing space" to carry out the regulatory purposes. *Id.*, at 360-61. *See also United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 627 (1974); *Jacobi* v. *Bache & Co.*, 520 F.2d 1231, 1237-39 (2nd Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976) (Friendly, J.). Evidence that a firm is acting consistently with articulable concerns of regulatory policy is relevant to the issue of whether that firm willfully misused monopoly power in violation of the Sherman Act.

II. The Court Of Appeals' Statement In A Footnote Concerning The Possible Effect Of Federal Income Taxation On Antitrust Damages Presents No Basis For Review By This Court.

The Court of Appeals held that the trial court had erroneously instructed the jury, contrary to the evidence, that it was to assess damages on the assumption WTC would have enjoyed a monopoly and would be the only company serving the Woodlands if Bell had voluntarily interconnected. The final paragraphs of the opinion further criticized petitioner's damage model on several additional grounds, one of which was that its exhibits were inconsistent in the treatment of income taxation because one exhibit showed net profits *before* taxes and a second showed net income *after* deduction of income taxes. *See* Appendix at A-36 & n. 19. At the conclusion of the footnote, it stated "Cf. *Norfolk & Western Ry. Co.* v. *Liepelt*, ___ U.S. ___, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980), for the Supreme Court's most recent pronouncement on the propriety of considering income taxes in damages awards."

Because the issue of the effect of income taxation on damages had not been briefed by the parties, it is evident that the court's statement was only a directive that taxation should be treated consistently in the damage model on retrial and in accordance with the law. It instructed the district court and the parties to focus on the issue of the correct treatment of taxes in computing antitrust damages on remand, where the damages issue will be retried in any event. Review of the Court of Appeals' *sua sponte* statement would be premature because neither it nor any lower court has explicitly focused on the issue.

CONCLUSION

The Court of Appeals correctly applied the principles established by this Court. The decision below does not conflict with the decision of any other court of appeals. Not only has the petition failed to show any reason why this Court should review any aspect of the decision, but its interlocutory character stands as an independent reason to deny the petition. The petition for certiorari should be denied.

Respectfully submitted,

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